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WRONGS AND THEIR REMEDIES.

A TREATISE

ON

THE LAW OF TORTS.

BY

C. G. ADDISON. Esq.

FOURTH ENGLISH EDITION.

By F. S. P. WOLFERSTAN, Esq.,

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

AMERICAN NOTES

BY

JAMES M. DUDLEY AND EDWIN BAYLIES,

COUNSELLORS-AT-LAW.

VOL. II.

BANKS & BROTHERS,
478 AND 475 BROADWAY, ALBANY;
144 NASSAU ST., NEW YORK.
1876.

Entered according to act of Congress, in the year eighteen hundred and seventy-six,

BY BANKS & BROTHERS,

In the office of the Librarian of Congress, at Washington.

CHARLES VAN BENTHUYSEN & SONS,
Printers, Stereotypers, Papermakers and Binders,
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THE LAW OF TORTS.

CHAPTER XII.

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SECTION I.

OF ASSAULT AND BATTERY, AND MAYHEM.

787 *What constitutes an assault.*—Every laying of hands on the person of another, and every blow or push, constitutes an assault and trespass, in respect of which an action for damages is maintainable, unless the act can be justified or excused on the ground that it was done

in self-defence, or in defence of one's property, or in obedience to some legal warrant or authority, or was the result of inevitable accident(*w*). Every attempt, also, to offer with force and violence to do hurt to another, constitutes an assault, such as striking at a person with or without a weapon; holding up a fist in a threatening attitude sufficiently near to be able to strike(*x*); presenting a gun or pistol, whether loaded or unloaded, in a hostile and threatening manner, within gun-shot or pistol-shot range, and near enough to create terror and alarm(*y*); riding after a man with a whip threatening to beat him, or shaking a whip in a man's face(*z*); advancing with hand uplifted in a threatening manner with intent to strike, although the person is stopped before he gets near enough to carry the intention into effect(*a*); hitting at one man and unintentionally striking another(*b*); cutting off the hair of a pauper in a poor-house(*c*); throwing water upon the person of another(*d*); and any gesture or threat of violence exhibiting an intention to assault, with the means of carrying that threat into effect(*e*). But, as regards threatening gestures, if the parties at the time the gestures are used are so far distant from each other that immediate contact is impossible, there is no assault(*f*).

Words accompanying a threatening gesture may deprive that gesture of the character of an assault. Thus, where a man laid his hand on his sword in a threatening manner, but accompanied the

(*w*) See Bullock *v.* Babcock, 3 Wend. 391.

(*x*) Murray *v.* Boyne, 42 Mo. 472. Hays *v.* People, 1 Hill, 351.

(*y*) State *v.* Cherry, 11 Ired. 475. Beach *v.* Hancock, 7 Foster (N. H.), 223. Richards *v.* State, 1 Sneed, 606. State *v.* Smith, 2 Humph. 457. And see Higginbotham *v.* State, 23 Texas, 574. A person who holds a cocked pistol in his hand and says: "Now I am ready for you," but without any attempt to use the pistol does not thereby commit an assault. Warren *v.* State, 33 Texas, 517. Nor will a person be guilty of an assault by presenting a pistol or gun at one who is out of range. Tarver *v.* State, 43 Ala. 354. But where a person within pistol range of another draws a pistol and bids the other be off or he will shoot him, this is an assault although the pistol was not cocked or presented. State *v.* Church, 63 N. C. 661. But in the absence of any words or other circumstances indicating an intention to fire, the act would not amount to an assault. Woodruff *v.* Woodruff, 29 Ga. 237.

(*z*) State *v.* Rawles, 65 N. C. 334.

(*a*) Bac. Abr. ASSAULT. Martin *v.* Shopper, 3 C. & P. 373. Stephens *v.* Myers, 4 C. & P. 350. Rex *v.* St. George, 9 C. & P. 493. See State *v.* Malcolm, 8 Clarke (Iowa), 413; Barnes *v.* Martin, 15 Wis. 240; State *v.* Vannoy, 65 N. C. 532.

Riding a horse so near a person as to endanger his safety, and to create a belief in his mind that it is the intention of the rider to ride over him is an assault. State *v.* Sims, 3 Strobh. 137. So an attack upon the horse harnessed to the carriage in which a person is riding is an assault upon the person in the carriage. De Marentille *v.* Oliver, 1 Penning. 380.

(*b*) James *v.* Campbell, 5 C. & P. 372.

(*c*) Forde *v.* Skinner, 4 C. & P. 239.

(*d*) Pursell *v.* Horne, 3 N. & P. 564.

(*e*) Read *v.* Coker, 13 C. B. 860.

(*f*) Pollock, C.B., Cobbett *v.* Grey, 4 Exch. 744. See Tarver *v.* State, 43 Ala. 354.

gesture with the words, "If it were not assize-time I would not take such language from you," it was held that the words showed that the party did not *then* intend to use his sword, and that there was no assault(*g*.) And Lord Abinger is reported to have held, that if a man presents an unloaded pistol at another, and at the same time says that he does not intend to shoot him, this is no assault(*h*).

The mere touching of a person, without force or violence, for the purpose of drawing his attention to some matter or another, is not an assault, unless it is done in a hostile or insulting manner(*i*); nor is it an assault to push gently against the person of another in endeavoring to make a way through a crowd; but if it is done in a rude and violent manner, or there is any struggling or pushing calculated to do harm, there will be both an assault and a battery(*j*).

An assault must be an act done against the will of the person assaulted, and therefore it cannot be said that a person has been assaulted by his own permission. If the act is done in the course of sport between persons taking liberties with each other by mutual consent, there is no assault(*k*).

788 *Assaults resulting from acts of negligence.*—An assault may be committed without any design or intention to commit an assault, for if the person of one man is violently struck through the carelessness and negligence of another, this is an assault, and it is no answer, as we have seen, to say that it was done unintentionally (*ante*, pp. 465, 466). Thus if a man drives against and violently upsets the plaintiff in his carriage, and knocks him down, or overturns the chair in which he is seated, the person thus striking the plaintiff, or knocking him down, is guilty of an assault, although he had no intention to commit an assault(*l*).

789 *Assaults by constables — Handcuffing unconvicted prisoners.* — If a constable orders an unconvicted prisoner to be handcuffed when there is no attempt to escape, nor any reasonable ground to fear a rescue, the constable will be responsible in damages for an assault(*m*).

(*g*) Tuberville *v.* Savage, 1 Mod. 3. See State *v.* Crow, 1 Ired. 376.
(*h*) Blake *v.* Barnard, 9 C. & P, 626.
(*i*) Coward *v.* Baddeley, 4 H. & N. 481; 28 Law J., Exch. 261.
(*j*) Cole *v.* Turner, 6 Mod. 149.
(*k*) Christopherson *v.* Bare, 11 Q. B. 477. Reg. *v.* Martin, 9 C. & P. 214. R. *v.* Johnson, 34 Law J., M. C. 192. Otherwise where the act is done under an agreement to fight. Adams *v.* Waggoner, 33 Ind. 531. Stout *v.* Wren, 1 Hawks, 420. Logan *v.* Austin, 1 Stew. 476. Bell *v.* Hansley, 3 Jones (N. C.), 131. Dole *v.* Erskine, 35 N. H. 503.
(*l*) Hopper *v.* Reeve, 7 Taunt. 698.
(*m*) *Post*, ch. 18, s. 2. Griffin *v.* Coleman, 28 Law J., Exch. 134; 4 H. & N. 265. Wright *v.* Court, 4 B. & C. 596.

790 *Assault and battery.*—A battery, as distinguished from an assault, is where the person of a man is actually struck or touched in a violent, angry, rude, or insolent manner(*n*). If a man is violently jostled out of the way or spat upon(*o*), or has water, stones, or dirt rudely thrown upon him(*p*), or has his hat insolently knocked off, or his hair forcibly cut(*q*), or his horse has been struck so that it ran away and threw him to the ground(*r*), the person guilty of the violence is liable to an action for an assault and battery. "But every laying on of hands is not a battery. The party's intention must be considered, for people will sometimes, by way of joke or in friendship, clap a man on the back, and it would be ridiculous to say that every such case constitutes a battery"(*s*). A touch given by a constable's staff in order to engage the attention of a person is not a battery(*t*).

791 *Mayhem and wounding.*—When the assault has been carried to the extent of maiming or crippling, or of wounding a person, it of course becomes of a much more serious character than a common assault, and the person injured will recover heavy damages, unless the maiming or wounding amounts to felony, or can be justified or excused in the manner presently mentioned. The old word "mayme" or "mayhem," derived from the French word *mayhemer* or *mehaigner*, was used to signify any hurt done to a man's body, whereby he was rendered less able in fighting either to defend himself or annoy his adversary; such as the cutting off, disabling, or weakening a hand or finger, striking out an eye or foretooth, breaking a bone, or injuring the head, or wounding a sinew, etc.(*u*).

(*n*) Rawlings *v.* Till, 3 M. & W. 28. An assault and battery is a fighting against the will of the party assailed. Duncan *v.* Commonwealth, 6 Dana, 295.

By the Revised Statutes of Maine, Chapter 118, § 28, an assault and battery is thus defined: "Whoever unlawfully attempts to strike, hit, touch or do any violence to another, however small, in a wanton, wilful, angry or insulting manner, having an intention and existing ability to do some violence to such person, shall be deemed guilty of an assault; and if such attempt is carried into effect, shall be deemed guilty of an assault and battery."

Where one after using threatening language to another, places his open hand upon the breast of the latter and pushes him back so that he falls, this is an assault and battery. State *v.* Baker, 65 N. C. 332. Taking hold of one's coat in an angry, rude or insolent manner or with a view to hostility, and detaining the wearer, is an assault and battery. United States *v.* Ortega, 4 Wash. C. C. 534. Whatever is attached to the person partakes of the inviolability of the person. Thus a blow on the skirt of a coat on the person of another is an assault and battery, as is also a blow upon a cane in the hand of another. See Respublica *v.* DeLongchamps, 1 Dall. 114; State *v.* Davis, 1 Hill, 46.

(*o*) Reg. *v.* Cotesworth, 6 Mod. 172.

(*p*) Pursell *v.* Horn, 8 Ad. & E. 604; 4 N. & P. 564.

(*q*) Forde *v.* Skinner, 4 C. & P. 239.

(*r*) Dodwell *v.* Burford, 1 Mod. 24; 1 Sid. 433.

(*s*) Ld. Hardwicke, Williams *v.* Jones, Hard. 301.

(*t*) Wiffin *v.* Kincard, 2 B. & P. N. R. 472. Coward *v.* Baddeley, *ante*, p. 691.

(*u*) Bac. Abr. MAIHEM. Beames's Glanv. p. 350. Bract. lib. 3, tr. 2.

792 *Assault and battery in self-defence.*—If the assault is in self-defence, and it can be shown that the plaintiff was the aggressor, and assaulted the defendant in the first instance, the action will be answered by a plea of *son assault demesne*, which is a plea alleging that the plaintiff first assaulted the defendant, who thereupon necessarily committed the alleged assault in his own defence(*v*). If one man strikes another, and the person struck, in the heat of anger, and on the impulse of the moment, returns the blow with a stick or bludgeon, the battery is excusable(*w*); but he has no right to revenge himself, and if, when all the danger is past, he strikes a blow not necessary for his defence, he commits an assault and battery(*x*). If a man strike another who does not immediately after resent it, but takes his opportunity, and then some time after falls upon him and beats him, in this case *son assault* is no good plea, and the second assault cannot be justified(*y*).

793 *Assault in defence of the possession of a house, or close, or of property(z).*—An assault and battery may be justified in defence of the possession of a house, or a close, or a vestry-room, or pulpit(*a*), or in defence of the possession of goods and chattels by the person entitled to the possession and use of them(*b*). If one man enters the house of another with force and violence, the owner of the house may justify turning him out, without a previous request to depart(*c*); but if he enters quietly, he must be requested to retire before hands can be lawfully laid upon him to turn him out. If he will not depart after having been requested so to do, the owner may use as much force as is necessary; and if the intruder resists the attempts of the owner of the house to turn him out, he is guilty of an assault upon the latter; and if a policeman standing by sees the resistance and witnesses the assault, he is justified in taking the intruder into custody. A policeman may also, with the authority and at the request of the master of the house,

(*v*) See 15 & 16 Vict. c. 76, sched. B.

(*w*) Oakes *v.* Wood, 3 M. & W. 150.

(*x*) Coleridge, J., Reg. *v.* Driscoll, Car. & M. 214. It is a settled doctrine of the law that if one be attacked, he may defend himself, using no more force than may be necessary to repel the attack, but should he go beyond this, and use more force than necessary, he himself becomes a trespasser, and his assailant, though first in the wrong, may maintain an action against him for damages. Adams *v.* Waggoner, 33 Ind. 531. Fisher *v.* Bridges, 4 Blackf. 518. Philbrick *v.* Foster, 4 Ind. 442. Dole *v.* Erskine, 35 N. H. 503. See State *v.* Gibson, 10 Ired. 214; Elliott *v.* Brown, 2 Wend. 497; Hazel *v.* Clark, 3 Harring. 22.

(*y*) Holt, C.J., Cockcroft *v.* Smith, 11 Mod. 43.

(*z*) As to equitable defence in such a case, see Allen *v.* Walker, L. R., 5 Exch. 187.

(*a*) Jackson *v.* Courtenay, 8 Ell. & Bl. 8; 27 Law J., Q. B. 37; Bro. Abr. TRESPASS, pl. 128. See Harrington *v.* People, 6 Barb, 607.

(*b*) Roberts *v.* Taylor, 1 C. B. 147. Scribner *v.* Beach, 4 Denio, 448.

(*c*) Weaver *v.* Bush, 8 T. R. 78. Scribner *v.* Beach, 4 Denio, 448. M'Ilvoy *v.* Cockran, 3 Marsh. 274. Robinson *v.* Hawkins, 4 Monr. 136.

himself proceed to turn out the intruder; but he is not bound to do so unless he pleases, as it is no part of a policeman's duty to do so(*d*). If a shopkeeper puts goods into a shop window, ticketed at a certain price, he is not bound to sell them at the price marked; and if a customer insists upon having the goods, and refuses to leave the shop after having been requested so to do by the shopkeeper or his servants, he may be turned out(*e*). If a man comes into a public house, and conducts himself in a disorderly manner, and the landlord requests him to go out, and he will not, the landlord may turn him out, though the disturbance does not amount to a breach of the peace. To do this, the landlord may lay hands on him, using no more violence than is necessary to turn him out. If the person resists, and lays hands on the landlord, that is an unjustifiable assault upon the landlord(*f*).

794 *Assault in resistance of a forcible entry, or to prevent a seizure of chattels.*—If one person enters another's house or ground with force and violence, the possessor or occupier of the house may oppose force by force, and turn the person out without a previous request to him to depart(*g*), unless the person making the forcible entry is a constable or officer acting under competent legal authority; for there is a manifest distinction between endeavoring to turn a man out of a house or close into which he has previously entered quietly, and resisting a forcible attempt to enter(*h*). The same rule prevails with regard to a forcible seizure of goods and chattels, for wherever force is used to gain possession of a thing, "the force may be opposed by force without more ado"(*i*), although the person using the force has a right to the possesse he seeks to acquire.

795 *Resistance to a forcible entry by a landlord.*—A forcible entry is expressly prohibited by the 5 Rich. 2, c. 7, even where entry is given by law. And it is laid down, that if a man enters peaceably into a house but turns the occupant out of possession by force, or by threats frightens him out of possession, this is a forcible entry(*j*). If a tenant who holds over after the expiration of his lease is *de facto* in possession

(*d*) Wheeler *v.* Whiting, 9 C. & P. 265.

(*e*) Timothy *v.* Simpson, 6 C. & P. 500.

(*f*) Howell *v.* Jackson. 6 C. & P. 725. Webster *v.* Watts, 11 Q. B. 311; 17 Law J., Q. B. 73. See Hannah *v.* Rust, 21 Wend. 149.

(*g*) Tulley *v.* Reed, 1 C. & P. 6.

(*h*) Polkinghorn *v.* Wright, 8 Q. B. 206.

(*i*) Green *v.* Goddard, 2 Salk. 641; Owen, 150. Actual possession will justify violence in defence of it; but a right of possession will not justify force in taking it. Parsons *v.* Brown, 15 Barb. 590.

(*j*) Bosanquet, J., Newton *v.* Harland, 1 Sc. N. R. 474; 1 M. & Gr. 660; Bac. Abr. FORCIBLE ENTRY.

of the house; if he is sitting in his drawing-room, or sleeping in his bed, and the landlord walks in at the front door, the latter cannot be said to be in possession of the house any more than the visitor who comes to make a morning call; and if he lays hands on the tenant and turns him out, he cannot truly say that this was done in defence of his (the landlord's) possession of the house, such possession not having been gained until *after* the exercise of the act of force constituting the assault(*jj*). But if the tenant, or any other person who has originally lawfully came into possession, voluntarily leaves the premises vacant, the landlord or lawful owner may at once enter, and take and keep possession. The previous possessor is then lawfully dispossessed, and if he re-enters he commits a trespass, and may be turned out of the house or off the land(*k*).

796 *Assaults in preservation of the public peace.*—Any person who witnesses an affray may, during the continuance of the affray, and for the purpose of putting a stop to it, lay hands on the affrayers(*l*). If he comes up in the midst of the affray, and forcibly interferes as a peacemaker for the purpose of separating the combatants and preventing further violence he is not guilty of a trespass, unless he uses more violence than is reasonably necessary for the purpose(*m*).

797 *Battery and wounding in self-defence, or in defence of the possession of tenements or chattels.*—When a person has been assaulted in such a way as to endanger his life, he is of course justified in maiming and wounding the attacking party; and if he has been violently assaulted, or assaulted in such a way as to put him into bodily fear, the mayhem or wounding, if inflicted in self-defence, is held excusable. "A man cannot justify a maim for every assault, as, if *A* strikes *B*, *B* cannot justify the drawing his sword and cutting off his hand"(*n*). "If *A* strike *B*, and *B* strike again, and they close immediately, and in the scuffle *B* maihems *A*, this maihem is excusable; but if, upon a little blow given by *A* to *B*, *B* gives him a blow that maihems him, this maihem is not excusable"(*o*).

"Cockcroft in a scuffle ran his finger towards Smith's eye, who bit a joint off from the plaintiff's finger: the question was, whether this

(*jj*) The doctrine of the text seems to be in conflict with the views of the court in Stearns & Wife *v.* Sampson, 59 Me. 508.

(*k*) Brown *v.* Dawson, 12 Ad. & E. 629. Taylor *v.* Cole, 3 T. R. 295. Taunton *v.* Costar, 7 T. R. 431. Butcher *v.* Butcher, 7 B. & C. 402. Sage *v.* Harpending, 49 Barb. (N. Y.) 166.

(*l*) Noden *v.* Johnson, 16 Q. B. 218.

(*m*) Timothy *v.* Simpson, 6 C. & P. 500.

(*n*) Per Cur. Cook *v.* Beal, 1 Ld. Raym. 177; 3 Salk. 115.

(*o*) Cockcroft *v.* Smith, 2 Salk. 642.

was a proper defence for the defendant to justify in an action of mayhem; and Holt, C.J., said that a man ought not, in the case of a small assault, to give a violent or unsuitable return, but in such a case plead what is necessary for a man's defence, and not who struck first, for hitting a man a little blow with a little stick on the shoulder is not a reason for him to draw a sword, and cut and hew the other"(*p*). To justify a battery, the defendant must show that there was an unlawful resistance on the part of the plaintiff to the lawful acts of the defendant. If the plaintiff complains of repeated blows, of his having been knocked down and wounded, or of his having had his leg broken, it is no answer to say that the plaintiff intruded himself into the defendant's dwelling-house, and made a disturbance, and would not go out, and therefore the defendant knocked him down, or cut his head open with a truncheon, or broke his leg, as no man is justified in resorting to such severe measures to expel an intruder, unless resistance has been offered; in which case the plea of justification must allege the fact of the resistance, and it must be shown that the force used was no more than was reasonably necessary to overcome such resistance(*q*).

In an action of trespass it was alleged that the defendant overturned a ladder upon which the plaintiff was standing, and threw the plaintiff from it upon the ground, and the defendant pleaded that he was possessed of a house and garden, and that the plaintiff erected a ladder in the garden, and went up the ladder in order to nail a board to the house of the plaintiff; that the defendant forbade the plaintiff so to do, and desired him to come down; and that, upon the plaintiff's persisting in nailing the board, he gently shook the ladder, and gently overturned it, and gently threw the plaintiff from it upon the ground, doing as little damage as possible to the plaintiff, and on demurrer to the plea it was held that the overturning and throwing down of the ladder, however gently, with the plaintiff upon it, was unjustifiable, and the plea bad(*r*).

(*p*) Cockcroft *v.* Smith, 11 Mod. 43.
(*q*) Gregory *v.* Hill, 8 T. R. 299. Oakes *v.* Wood, 2 M. & W. 791.
(*r*) Collins *v.* Renison, Say. 138.

SECTION II.

OF FALSE IMPRISONMENT.

798 *False imprisonment* is a trespass committed by one man against the person of another, by unlawfully arresting him, and detaining him without any legal authority. Every confinement of the person is an imprisonment, whether it be in a common prison, or a private house, or in the stocks, or by forcibly detaining any one in the public streets(*rr*). False imprisonment may also arise from the arrest or detention of the person by an officer without a warrant, or by an illegal warrant, or by a legal warrant executed at an unlawful time.

799 *Constructive imprisonment.*—Actual contact is not necessary to constitute an imprisonment(*s*). Any restraint put upon the freedom of another by show of authority or force, is sufficient to constitute an imprisonment; so that, if a person is restrained from leaving a room, or going out of a house, without the presence of a constable, this infringement of his personal liberty will constitute an imprisonment(*ss*). If a bailiff who has a process against any one says to him, "You are my prisoner, I have a writ against you," upon which the person addressed submits, turns back, or goes with him, though the bailiff never touched him, yet it is an arrest, because he submitted to the process(*t*). If a person is commanded by a constable to go with him, and the order is obeyed, and they walk together in the direction pointed out by the constable, that is constructively an imprisonment, though no actual force be used; for the party addressed feels that he has no option, no more power of going in any but the one direction prescribed to him, than if the constable or bailiff had actual hold of him;

(*rr*) Floyd *v.* State, 7 Eng. 43.

(*s*) Brushaben *v.* Hegeman, 22 Mich. 266. Hawk *v.* Ridgway, 33 Ill. 473.

(*ss*) Warner *v.* Riddiford, 4 C. B., N. S. 206. It is not necessary for the plaintiff to show that the defendant used violence, or laid hands on him, or shut him up in jail or prison, to sustain an action for false imprisonment. It is sufficient to show that the defendant, at any time or place, in any manner restrained the plaintiff of his liberty, or detained him in any manner from going where he wished, or prevented him from doing what he desired. Hawk *v.* Ridgway, 33 Ill. 473. Smith *v.* State, 7 Humph. 43.

If a person is arrested and threatened with imprisonment upon a void writ in a civil action, and is compelled to promise and to procure the promise of others that he will not abscond, and is subjected to expense in procuring an order to set aside the writ, he may recover for this interference with his person and restraint of his liberty, although he is not actually imprisoned. Bonesteel *v.* Bonesteel, 28 Wis. 245; 30 Wis. 511.

(*t*) Grainger *v.* Hill, 4 B. N. C. 212. Jones *v.* Jones, 13 Ired. 448. See Field *v.* Ireland, 21 Ala. 240; Emery *v.* Chesley, 18 N. H. 198; Pike *v.* Hanson, 9 Ib. 491.

and it is that entire restraint upon the will which constitutes the imprisonment(*u*). "If you put your hand upon a man, or tell him he must go with you, and he goes, supposing that you have the right and the power to compel him, that is an arrest"(*x*) But a partial restraint of the will of a person is not sufficient to constitute an imprisonment. Thus, where a part of a public footway on a bridge was taken and appropriated for seats to view a regatta, and separated for that purpose from the adjoining carriage-road by a temporary fence, and the plaintiff insisted upon a right of way across the part so appropriated, and climbed over the fence, but was stopped by two policemen, who prevented him from proceeding onwards, but at the same time told him he might go back if he pleased, which the plaintiff refused to do, and remained where he was for half-an-hour, it was held that this was no imprisonment(*y*).

800 *Imprisonment by order of a judge or judicial officer.*—All judges of a court of record have power to commit to the custody of their officer *sedente curiâ*, by oral command, without any warrant made at the time. This proceeds upon the ground that there is, in contemplation of law, a record of such commitment, which record may be drawn up when necessary. A prisoner is in lawful custody although committed to prison for the purpose of being brought up again for rehearing, without any warrant or commitment in writing(*z*).

801 *Arrest in execution of warrants of justices.*—Constables making an arrest in execution of a warrant of justices ought to have their warrant with them, ready to be produced in case it should be required. Not having it, they are not justified in making an arrest, unless the arrest be made for felony, or suspicion of felony(*a*).

802 *Arrest by constables without warrant.*—A constable has no power at common law to arrest a person without warrant on suspicion of his having committed a misdemeanor(*b*); but if he has reasonable cause to suspect that a person has committed a felony, he may detain such person, not being an infant under the age of seven years, incapable of committing a felony(*c*), until he can be brought before a justice of the

(*u*) Williams, J., Bird *v.* Jones, 7 Q. B. 743; 2 Inst. 589; Bull, N. P. 62. See Courtoy *v.* Dozier, 20 Ga. 369.

(*x*) Tindal, C.J., Wood *v.* Lane, 6 C. & P. 774.

(*y*) Bird *v.* Jones, 7 Q. B. 742. See Moses *v.* Dubois, Dudley (S. C.), 209.

(*z*) Kemp *v.* Neville, 31 Law J., C. P. 165. Throgmorton *v.* Allen, 14 M. & W. 70.

(*a*) Galliard *v.* Laxton, 31 Law J., M. C. 123. Commonwealth *v.* Carey, 12 Cush. (Mass.) 246. Commonwealth *v.* McLaughlin, ib. 615.

(*b*) Bowditch *v.* Balchin, 5 Exch. 380. Griffin *v.* Coleman, 28 Law J., Exch. 134; 4 H. & N. 265. Commonwealth *v.* Carey, 12 Cush. (Mass.) 246. Commonwealth *v.* McLaughlin, id. 615.

(*c*) Marsh *v.* Loader, 14 C. B., N. S. 535.

peace to have his conduct investigated(*d*). There is no standard or fixed rule as to what is reasonable ground of suspicion which can be laid down as applicable to all cases. "The charge," observes Watson, B., "may be reasonable or unreasonable with reference to the circumstances and the character of the party making it. And while on the one hand a constable ought to be protected in the execution of his duties, he ought on the other to be guided in the discharge of those duties by ordinary reason, care, and caution." Where, therefore, a travelling showman told the defendant, a police-constable, at a fair, that he had had some harness stolen a year before, and that the stolen harness was on the plaintiff's horse, and the constable went to the plaintiff, and asked him where he got the harness, and the plaintiff gave the common thief's answer—that he had bought the harness of a man he did not know, and had given him a shilling for it,—whereupon the constable took the plaintiff into custody, but it appeared that the constable had known the plaintiff for twenty years as a respectable householder, it was held that there was no reasonable cause for the arrest, and that the constable was responsible in damages for a wrongful imprisonment(*e*). But if one man charges another with having robbed him, and desires a constable to apprehend the suspected thief, and the constable does so without warrant, the constable is not responsible for the imprisonment because it turns out that the charge is false, and that no felony had in fact been committed(*f*); for if one man charges another with felony, and requires an officer to take him into custody, and carry him before a magistrate, "it would be most mischievous," observes Lord Mansfield, "that the officer should be bound first to try and at his peril exercise his judgment on the truth of the charge. He that makes the charge alone is answerable. The officer does his duty in carrying the accused before a magistrate, who is authorized to examine and commit or discharge"(*g*). If an arrest by a constable is in its inception wrongful, all other constables who aid and assist in the continuance of the wrongful imprisonment are responsible for the entire damage thereby caused to the plaintiff, although they had no knowledge of the unlawfulness of the imprisonment, and intended to act in

(*d*) Beckwith *v.* Philby, 6 B. & C. 635; 9 D. & R. 487. Lawrence *v.* Hedger, 3 Taunt. 14. Buckley *v.* Gross, 32 Law J., Q. B. 129. Burns *v.* Erben, 40 N. Y. 463. Drennan *v.* People, 10 Mich. 169. Eanes *v.* State, 6 Humph. 53. Brockway *v.* Crawford, 3 Jones, Law (N. C.), 433.

(*e*) Hogg *v.* Ward, 3 H. & N. 417; 27 Law J., Exch. 443.

(*f*) Hale, P. C., 177, Davis *v.* Russell, 2 M. & P. 607; 5 Bing. 354. See Forrist *v.* Leavitt, 52 N. H. 481.

(*g*) Samuel *v.* Payne, 1 Doug. 360.

strict discharge of their official duty(*h*). Every unlawful detainer of a prisoner after he has gained a right to be discharged is a fresh imprisonment(*i*).

803 *Arrest by a private person without warrant.*—"If treason or felony be done," observes Lord Coke, "and one hath just cause of suspicion, this is a good cause and warrant in law for him to arrest any man; but he must show in certainty the cause of his suspicion, and whether the suspicion shall be just or lawful shall be determined by the justices in an action for false imprisonment brought by the party grieved, or upon a *habeas corpus*"(*k*). There is this distinction between an arrest for felony by a private individual and a constable. In order to justify the private individual in causing the imprisonment, he must not only make out a reasonable ground of suspicion, but he must prove that a felony has actually been committed by some person or another, and that the circumstances were such that any reasonable person acting without passion or prejudice would have fairly suspected that the plaintiff committed it, or was implicated in it(*l*); whereas a constable, having reasonable ground to suspect that a felony has been committed, although in fact none has been, is authoized to detain the person suspected until he can be brought before a justice of the peace to have his conduct investigated(*m*).

Every person to whom property is offered to be sold, pawned, or delivered, may, if he has reasonable cause to suspect that an offence punishable by the Larceny Amendment Act, 24 & 25 Vict. c. 96, has been committed on or with respect to such property, apprehend the person offering the same, and take him, together with the property, before a justice of the peace(*n*); and any person "found committing" an offence punishable by the Act, except the offence of angling in the daytime, may be immediately apprehended by any person without a warrant, and taken before a justice, together with the property, if any. Ibid.

804 *Arrest for a misdemeanor.*—Regularly no private person can of his

(*h*) Griffin *v.* Coleman, 4 H. & N. 265; 28 Law J., Exch. 134. Wright *v.* Court, 4 B. & C. 596. See Pow *v.* Beckner, 3 Ind. 475; Vinton *v.* Weaver, 41 Me. 430.

(*i*) Withers *v.* Henley, Cro. Jac. 379. Ruffner *v.* Williams, 3 W. Va. 248.

(*k*) 2 Inst. 52. Davis *v.* Russell, 5 Bing. 357; 2 M. & P. 590. That a private person is justified in arresting another when a felony has actually been committed, and there is probable ground to suspect the person arrested to be the guilty party, see Reuck *v.* McGregor, 3 Vroom (N. J.), 70; Brockway *v.* Crawford, 3 Jones' Law (N. C.), 433.

(*l*) Tindal, C.J., Allen *v.* Wright, 8 C. & P. 526. Hall *v.* Booth, 3 N. & M. 316. Burns *v.* Erben, 40 N. Y. 463. Mix *v.* Clute, 3 Wend. 350.

(*m*) Ld. Tenterden, Beckwith *v.* Philby, 6 B. & C. 638; *ante*, p. 699.

(*n*) 24 & 25 Vict. c. 96, s. 103. See 32 & 33 Vict. c. 12, s. 10; c. 57, s. 6.

own authority, without warrant, arrest another for a misdemeanor, except for a breach of the peace, whilst the strife is going on, and to prevent its continuance. But it is said in Hawkins' "Pleas of the Crown," "that any private person may lawfully arrest a suspicious night-walker, and detain him till he make it appear that he is a person of good reputation. Also it hath been adjudged that any one may apprehend a common notorious cheat going about the country with false dice, and being actually caught playing with them, in order to have him before a justice of the peace, for the public good requires the utmost discouragement of all such persons; and the restraining of private persons from arresting them without a warrant from a magistrate would often give them an opportunity of escaping"(*o*). "These cases in Hawkins," observes Lord Tenterden, "are where the party is caught in the fact, and the observation there added assumes that the person arrested is guilty. Where the case is only one of suspicion, the arrest is unjustifiable. The instances in Hale of arrest on suspicion, after the act has been done, relate to felony. In cases of misdemeanor, the parties aggrieved should apply to a justice of the peace for a warrant, and not take the law into their own hands"(*p*).

805 *Arrest of the wrong party.*—If the wrong person is arrested by mistake, all persons causing the arrest are liable in trespass for the injury(*q*), unless the party complaining has brought the injury upon himself by his own misstatements and misrepresentations. If there was lawful ground for arresting *A*, and *B* represents himself to be *A*, and is arrested in consequence of that representation, he has obviously no valid ground for complaining of the imprisonment which naturally resulted from his own act. But after he has given notice that he is not the person he represented himself to be, he cannot lawfully be detained for a greater length of time than may be reasonably necessary to ascertain which of the several statements he has made is in accordance with the truth(*r*).

806 *Arrest for malicious injuries to property.*—The statutes for consolidating the laws relative to malicious injuries to property, enact, that ary person found committing any offence under that Act may be immediately apprehended without a warrant, by any peace-officer, or owner of the property injured, or his servant or any person authorized

(*o*) Hawkins, P. C. 2, c. 12, s. 20.
(*p*) Fox *v.* Gaunt, 3 B. & Ad. 800.
(*q*) Davies *v.* Jenkins, 11 M. & W. 754. Miller *v.* Foley, 28 Barb. 630. McMahan *v.* Green, 34 Vt. 69.
(*r*) Dunston *v.* Paterson, 2 C. B., N. S. 495; 26 Law J., C. P. 267.

by him, and forthwith taken before some neighboring justice of the peace, to be dealt with according to law(*s*). To justify an arrest under this statute, it must be shown that the offence prohibited and made punishable was actually committed(*t*), that the plaintiff was found and taken in the act(*u*), and that the person arresting was either the occupier or the landlord of the property injured. It must also be shown that the trespass was a wilful and malicious trespass.

807 *Wilful and malicious trespass.*—A trespass can only be wilful and malicious where it is committed by a person who knows that he has no claim or pretence of right to enter the land. If he had reasonable ground for supposing that he had a right, his conduct can neither be called wilful nor malicious(*x*).

808 *Arrest of persons committing indictable offences in the night.*—It is lawful for a private individual to apprehend any one who shall be "found committing" any indictable offence in the night, *i.e.*, between 9 p.m. and 6 a.m., and to convey him or deliver him to some constable or other peace-officer, to be conveyed before a justice of the peace, to be dealt with according to law(*y*).

809 *Arrest for an assault and breach of the peace.*—A constable may *ex officio* arrest a breaker of the peace in his view, and keep him in his house, or in the stocks, till he can bring him before a justice of the peace. "If *A* be dangerously hurt, and the common voice is that *B* hurt him, or if *C* thereupon come to the constable and tell him that *B* hurt him, the constable may imprison *B* till he knows whether *A* lives or dies, and until he can bring him before a justice. But if there be only an affray, and not in view of the constable, it hath been held he cannot arrest him without warrant(*z*). If an assault be committed within view of a constable, he has authority to arrest the offender at the time, or as soon after as he conveniently can, so as to come within the expression "recently," not only to prevent a further breach of the peace, but also to secure the offender for the purpose of taking him before a magistrate(*a*). If a constable is preventing a breach of the peace, and any person stands in his way with intent to hinder him from so doing, the constable is justified in taking

(*s*) 24 & 25 Vict, c 97, s. 61.
(*t*) Parrington *v.* Moore, 2 Exch. 225.
(*u*) Simmons *v.* Millingen, 2 C. B. 530.
(*x*) Looker *v.* Halcomb, 12 Moore, 416; 4 Bing. 183.
(*y*) 14 & 15 Vict. c. 19, s. 11.
(*z*) Hale, P. C. 587.
(*a*) Reg. *v.* Light, 27 Law J., M. C. 1. Vandevere *v.* Mattocks, 3 Ind. 479. Boyleston *v.* Kerr, 3 Daly (N. Y.), 220. Hutchinson *v.* Sangster, 4 Greene (Iowa), 340.

such person into custody, but not in giving him a blow(*b*), nor in handcuffing him.

Various statutes provide for the punishment of all persons who shall assault peace-officers or revenue officers(*c*), metropolitan police-officers(*d*), special constables and district constables(*e*); in the execution of their duty, or who aid or incite others so to do.

810 *Arrest during the continuance of an affray.*—For the preservation of the peace, any individual who sees it broken may restrain the liberty of him he sees breaking it, so long as the conduct of such person shows that the public peace is likely to be endangered by his acts. Any bystander may, and ought to, arrest an affrayer at the moment of the affray, and detain him till his passion be cooled, and then deliver him to a peace officer, to be carried before a justice of the peace, to be compelled to find sureties for keeping the peace; but a private individual who has witnessed an affray cannot after the affray has ceased lawfully give the affrayers, or one or some of them, into custody, unless the affrayers continue on the spot, and refuse to disperse, and there is a reasonable apprehension of a renewal of the affray(*f*). If the affrayers, on hearing or seeing that the police-constables are coming, run away and disperse, they cannot lawfully be pursued and taken by constables, or given into custody by private individuals, for the affray that is then ended(*g*). If during an affray a bystander calls up a policeman, and directs him to take one of the affrayers into custody, the bystander does not thereby render himself amenable to an action for false imprisonment(*h*).

The continued ringing at a door-bell without cause or excuse does not in itself amount to a breach of the peace, so as to justify the arrest of a person by a private individual; but it is eminently calculated to lead to a breach of the peace, and if it is done and persisted in within view of a constable, the latter may take the aggressor into custody(*i*). And if the nuisance be committed within the metropolitan police district, the offender may, if found in the act, be apprehended by the master of the house(*k*). If a man threatens to force his way into the

(*b*) Levy *v.* Edwards, 1 C. & P. 40.
(*c*) 9 Geo. 4, c. 31, s. 25.
(*d*) 2 & 3 Vict. c. 47, s. 18.
(*e*) 1 & 2 Wm. 4, c. 41, s. 11; 2 & 3 Vict. c. 93, s. 8.
(*f*) Timothy *v.* Simpson, 1 C. M. & R. 757. Price *v.* Seeley, 10 Cl. & Fin. 59.
(*g*) Baynes *v.* Brewster, 2 Q. B. 385. See Pow *v.* Beckner, 3 Ind. 475.
(*h*) Derecourt *v.* Corbishley, 5 Ell. & Bl. 188.
(*i*) Grant *v.* Moser, 5 M. & Gr. 123; 6 Sc. N. R. 466.
(*k*) Simmons *v.* Millingen, 2 C. B. 524. See *post*, p. 707.

house of another, and collects a mob at the door, and refuses to go away when directed so to do, the owner of the house is justified in directing a constable to take him into custody, in order to preserve the peace(*l*).

811 *What amounts to a breach of the peace.*—It must be shown that there was an actual breach of the peace in order to justify an imprisonment. It is not enough to show that the plaintiff "made a great noise and disturbance, and refused to depart, and was in great heat and fury, ready and desirous to make an affray and commit a breach of the peace"(*m*). Disturbance and annoyance of a public meeting, by putting questions to the speakers, making observations on their statements, and saying, "That's a lie," do not constitute a breach of the peace(*n*). But if a man comes into a public-house, and makes a very great noise and disturbance therein, and creates alarm and disquiets the neighborhood, his conduct amounts to a breach of the peace, and justifies the landlord in giving him into custody, if the disturbance occurs within view of a constable(*o*). If a man stops before the door of a dwelling-house or shop, applying abusive and opprobrious epithets to the inmates, and attracts a crowd, and refuses to desist when requested, he commits a breach of the peace(*p*).

812 *Arrest of persons disturbing divine service.*—Any person who is guilty of riotous, violent, or indecent behavior in any church or chapel, or duly certified place of religious worship, or in any churchyard or burial-ground, or who molests, disturbs, vexes, or troubles any preacher duly authorized to preach therein, or any clergyman celebrating divine service, etc., may immediately on the commission of the misdemeanor, be apprehended by any constable or churchwarden of the place and taken before a magistrate; 23 & 24 Vict. c. 32, ss. 2, 3. To bring the offender within this statute it must be shown that the disturbance was wilful and intentional(*q*). A clergyman engaged in collecting the offertory while another clergyman is reading the offertory sentences, is not celebrating divine service, within the meaning of the above Act; though it would seem that for the churchwardens, or other persons to interfere with him while so doing, might

(*l*) Ingle *v.* Bell, 1 M. & W. 516.
(*m*) Wheeler *v.* Whiting, 9 C. & P. 262.
(*n*) Wooding *v.* Oxley, 9 C. & P. 1.
(*o*) Howell *v.* Jackson, 6 C. & P. 723. Webster *v.* Watts, 11 Q. B. 311; 17 Law J., Q. B. 73.
(*p*) Cohen *v.* Huskisson, 2 M. & W. 482.
(*q*) Williams *v.* Glenister, 2 B. & C. 699. See Wall *v.* Lee, 34 N. Y. 141.

render them guilty of the offence of brawling within the first part of the section(qq).

813 *Arrest of vagrants and persons found committing acts of public indecency.*—The Vagrant Act, 5 Geo. 4, c. 83(r), authorizes any person whatsoever to apprehend any one found committing any of the acts of vagrancy specified in s. 4 of the statute, such as fortune-telling, indecent exposure of the person in any street, road, or place of public resort, or within view thereof, with intent to insult any female; gathering of alms by exposure of wounds and deformities; collection of alms by false pretences; playing or betting in streets or public places with instruments of gaming, etc.

814 *Arrest under the Merchant Shipping Act.*—By 25 & 26 Vict. c. 63, s. 37, power is given to the master or other officer of any duly surveyed passenger steamer and his assistants to detain persons whose name and address are unknown, and who have committed any of the offences specified in the Act, such as being drunk and disorderly, and refusing to leave a steamer after request and return or tender of the fare paid; molesting passengers after warning by an officer not to do so; persisting in entering or refusing to leave a steamer having its full complement of passengers; travelling, or attempting to travel, without previous payment of the fare, with intent to avoid payment; proceeding beyond the distance for which the fare is paid, with intent to avoid payment for the additional distance; refusing to leave the steamer on arriving at the point to which the fare is paid; refusing either to pay the fare, or to exhibit the ticket or receipt for the fare, when demanded; wilfully obstructing any of the crew in the execution of their duty upon or about the steamer, etc.

815 *Arrest of a principal by his bail.*—The bail may, whenever they please, render their principal in their own discharge. They may take him up even upon a Sunday, and confine him until the next day, and then render him; and the doing it on a Sunday is no service of process, but rather like the case where a sheriff arrests by virtue of a process of court on Saturday, and the party escapes, and the sheriff takes him upon a Sunday, which he may do, for it is only a continuance of the former imprisonment(s). A witness who has given bail is always supposed to be in the custody of his bail, and may be taken

(qq) Cope v. Barber, L. R., 7 C. P. 393.
(r) Amended by 31 & 32 Vict. c. 52 and 32 & 33 Vict. c. 99, s. 9. See Hirst v. Molesbury, L. R., 6 Q. B. 130.
(s) Per Cur. Anon. 6 Mod. 231.

and rendered at any time, even while he is attending as a witness in a court of justice in obedience to his subpœna(*t*).

816 *Arrest for offences committed within the limits of the metropolitan police district*(*u*).—The 2 & 3 Vict. c. 47, s. 54, enables any constable belonging to the metropolitan police force to take into custody, without warrant, any person who, within his view(*v*), shall commit any of the various offences therein specified, and forbidden within the limits of the metropolitan police district. Among these offences may be enumerated the exposing, to the annoyance of the inhabitants or passengers, of horses for show or sale; the exhibition of carts, vans, shows, or public entertainments; suffering ferocious dogs to go at large unmuzzled(*x*), or urging one dog to attack another; negligent driving of cattle or animals(*y*); riding on the shafts of carriages without holding the reins; furious driving; wilfully obstructing public crossings and public thoroughfares(*z*); riding animals or driving carriages, trucks, or barrows upon, or fastening horses across, footways(*a*); rolling any cask, tub, hoop, wheel, etc., upon footways, except for the purpose of crossing them, or loading or unloading carriages; disregarding the police regulations for preventing obstructions in public thoroughfares; posting bills or papers upon walls and buildings without consent of the owner or occupier; using threatening, abusive, or insulting words or behavior, whereby a breach of the peace may be occasioned; blowing of horns, or any other noisy instrument, for the purpose of calling persons together, or announcing any show or entertainment, or for the purpose of selling articles, or obtaining money or alms; wantonly discharging fire-arms, stones, or other missiles, to the danger of any person; making bonfires, or throwing or setting fire to any firework; wilfully and wantonly disturbing any inhabitant, by pulling or ringing any door-bell, or knocking at any door without lawful excuse, or wilfully and unlawfully extinguishing the light of any lamp; flying a kite, or playing at any game, to the annoyance of the inhabitants and passengers, or making a slide upon the ice or snow in any thoroughfare.

(*t*) Lyne, *Ex parte*, 3 Stark. 132. Horn *v.* Swinford, D. & Ry. N. P. C. 20.

(*u*) See 31 & 32 Vict. c. 67, s. 4. And see the Metropolitan Streets Act, 1867; 30 & 31 Vict. c. 134; and 32 & 33 Vict. c. 12, s. 6, as to ships, persons, etc., suspected of unlawfully being in possession of Government stores.

(*v*) Justice *v.* Gosling, 21 Law J., C. P. 94.

(*x*) See 30 & 31 Vict. c. 134, s. 18.

(*y*) See 30 & 31 Vict. c. 134, s. 7.

(*z*) See 30 & 31 Vict. c. 134, ss. 6, 15

(*a*) As to costermongers, street hawkers, etc., see 31 & 32 Vict. c. 5.

Metropolitan police constables, and all persons whom they shall call to their assistance, are further empowered (s. 63) to arrest, without warrant, any person who, within view of any such constable, shall offend in any manner against the Act, and whose name and residence shall be unknown to, and cannot be ascertained by, such constable; also, all disorderly persons disturbing the public peace, whom he shall have good cause to suspect of having committed, or being about to commit, any felony, misdemeanor, or breach of the peace; also, persons charged with aggravated assaults, where he has good reason to believe that the assault has been committed, though not within his view, and that by reason of the recent commission of the offence a warrant could not have been obtained for the apprehension of the offender; also, all persons found committing any offence punishable, either upon indictment, or as a misdemeanor upon summary conviction, by virtue of the statute.

Any person, also, found committing an offence punishable, upon indictment, or as a misdemeanor upon summary conviction, by virtue of the Metropolitan Police Act, may be apprehended by the owner of the property, on or with respect to which the offence shall be committed, or by his servant, or any person authorized by him, and may be detained until he can be delivered into the custody of a constable, to be dealt with according to law (ss. 63, 66). In order to justify a private individual in arresting and detaining an offender within the 66th section, the latter must be actually "found committing" the offence, and must be taken *flagrante delicto*; it is not enough to show that he has committed the offence, however recently. If the offence be, that the party has knocked and rung at a dwelling-house, to the disturbance of the inmates, and the offender has ceased to knock and ring, and has walked away, whether a yard or a quarter of a mile it matters not, he is not within the words or the policy of the section, which only applies where the offender is arrested in the course of committing the offence, and it is necessary to apprehend him in order to prevent a continuance of the nuisance(*b*).

817 *Arrest by servants of railway companies.*—Many Acts of Parliament, under which railway companies are incorporated, authorize any officer or agent of the company to seize and detain any person whose name and residence shall be unknown, who shall commit any offence against the Act, and to convey him with all convenient dispatch before some justice, etc., without any other warrant or authority than that given

(*b*) Simmons *v.* Millingen, 2 C. B. 533.

by the Act. These statutes do not authorize railway companies, their officers or agents, to take a person into custody, or to detain him, for riding in a first-class carriage with a second-class ticket, or for riding in a carriage without a ticket, or for refusing to pay his fare when it is demanded, or for mere acts of omission or offences against by-laws(*c*). By 8 Vict. c. 20, ss. 103, 104, a penalty is imposed upon any person travelling on a railway without having paid his fare, with intent to avoid payment thereof, and power is given to all officers and servants, on behalf of the company, to apprehend such person until he can conveniently be taken before a justice. In the ordinary course of affairs, the company must determine whether they will submit to what they believe to be an imposition, or use this summary power for their protection; and as the decision whether a particular passenger shall be arrested or not must be made without delay, it must be presumed that the officers of the company charged with the management of traffic have authority to determine whether passengers are to be taken into custody for this offence; and if by mistake an innocent person is apprehended by order of a superintendent, the company will be answerable for the wrong done(*d*). Pulling down boards set up by the company, and other injuries to their property, seem to be offences for which persons found in the commission of them are liable to be at once taken into custody, and carried before a magistrate.

818 *Detention of recruits and deserters.*—The Articles of War do not justify the arrest and detention by an officer of any but a recruit or a soldier. The annual Mutiny Act generally enacts, that every person who shall knowingly receive enlistment-money from certain persons employed in the recruiting-service "shall be deemed to be enlisted as a soldier in Her Majesty's service"(*e*). If a person apprehended as a deserter turns out to be a civilian, and not a recruit or soldier, the parties who apprehended him, or ordered or procured his imprisonment, will be responsible in damages for the wrong done, for none are bound by the Mutiny Act or the Articles of War except Her Majesty's forces.

819 *Imprisonment of dangerous lunatics.*—A private person may, without any warrant or authority, confine a person disordered in his mind, who seems disposed to do mischief to himself or to any other person(*f*), the restraint being necessary both for the safety of the lunatic, and

(*c*) Chilton *v.* Lond. & Croydon Rail. Co., 16 M. & W. 231. Tollemache *v.* Lond. & South-West. Rail. Co., 26 Law T. R. 222. Goff *v.* Gt. North. Rail. Co., 30 Law J., Q. B. 148. See Poulton *v.* Lond. & South-Western Rail. Co., *post*, p. 721.

(*d*) Goff *v.* Gt. North. Rail. Co., *ut sup.*

(*e*) See Wolton *v.* Gavin, 16 Q. B. 48.

(*f*) Bro. Abr. FAUX IMPRISONMENT, pl. 23.

the preservation of the public peace; but as the custody of these unfortunate persons is matter of great public interest, the legislature has, by a series of enactments, established appropriate tribunals and forms of proceeding for ascertaining their exact mental condition, and imposing the necessary restraint upon their actions, under the supervision of public functionaries.

The 8 & 9 Vict. c. 100, and 16 & 17 Vict. c. 96(*g*), establish a form of proceeding, based upon medical certificates, for the purpose of facilitating the reception of persons of unsound mind, who are dangerous to themselves or to others, in asylums where they are to be properly restrained and treated. If the forms of proceeding prescribed by this Act are not strictly complied with, the imprisonment is unlawful(*h*). The fact of a person's acting so as to appear to be of unsound mind is no justification to another for locking him up as a lunatic, without compliance with the requisite form of proceeding. It must be proved that the person imprisoned was, at the time the restraint was put upon him, a dangerous lunatic. The statutes now in force as to the certificates required to be made by the friend of a supposed lunatic and the medical men, protect every person acting in pursuance of the Act, except the person signing the order for the confinement of the lunatic. The certificates of all the doctors and physicians in the world will not justify one person in taking and confining another as a lunatic, unless it be proved that the person confined was really a dangerous madman, or unless the person justifying the imprisonment is a medical man, or the keeper of the asylum, or his servant, entitled to statutory protection(*i*).

SECTION III.

OF ACTIONS FOR AN ASSAULT AND BATTERY, AND FOR FALSE IMPRISONMENT(*j*).

820 *Statutory protection to constables and their assistants from vexatious actions.*—By 7 Jac. 1, c. 5, and 21 Jac. 1, c. 12, s. 5, it is enacted, that if any action upon the case, trespass, battery, or false imprisonment,

(*g*) See Gore *v.* Grey, 33 Law J., C. P. 109.
(*h*) Coleridge J., Reg. *v.* Pinder, 24 Law J., Q. B. 148. Reg. *v.* Munster, 20 ib. M. C. 48. Norris *v.* Seed, 3 Exch. 782.
(*i*) Fletcher *v.* Fletcher, 28 Law J., Q. B. 134.
(*j*) See 30 & 31 Vict. c. 142, s. 10, *ante*, p. 675.

shall be brought against constables, their deputies or assistants, for or concerning any matter by them done by virtue of their offices, the said action shall be laid within the county where the trespass or fact shall be done or committed, and not elsewhere; and that it shall be lawful for such constables, etc., to plead the general issue, not guilty, and to give any special matter discharging them from liability in evidence to the jury; and that if upon the trial of any such action the plaintiff shall not prove to the jury that the trespass, battery, imprisonment, or other fact or cause of action was committed or done within the county wherein the action shall be laid, the jury shall find the defendant not guilty, without regard to any evidence on the merits.

By the 1 & 2 Wm. 4, c. 41, providing for the appointment of special constables, it is enacted (s. 19), for the protection of persons acting in execution of the Act, that all actions and prosecutions to be commenced against any person for anything done in pursuance of the Act, shall be laid and tried in the county where the fact was committed, and shall be commenced within six calendar months after the fact committed, and not otherwise; and notice in writing of such action, and of the cause thereof, shall be given to the defendant one calendar month at least before the commencement of the action; and in any such action the defendant may plead the general issue, and give the Act and the special matter in evidence at the trial; and no plaintiff shall recover in any such action, if tender of sufficient amends shall have been made before action brought, or if a sufficient sum of money shall have been paid into court after action by or on behalf of the defendant.

The Municipal Corporations Act, 5 & 6 Wm. 4, c. 76, regulating the appointment of constables for boroughs, further provides (s. 76), that the men sworn as such constables shall not only within the borough, but also within the county in which the borough or any part thereof is situate, and in any county within seven miles of the borough, have all such powers and privileges, and be liable to all such duties and responsibilities, as any constable duly appointed then had, or thereafter might have, within his constablewick by virtue of the common law, or of any statutes made or to be made; and s. 113 contains the usual clause for the protection of persons acting in execution of the Act, making all actions against such persons triable only in the county where the act was done, limiting them to six months from the accrual of the cause of action, making one calendar month's notice of action essential, and enabling the defend-

ant to plead the general issue, and give any special matter of justification or excuse in evidence at the trial, and prohibiting the plaintiff from recovering after tender of sufficient amends before action, or payment of a sufficient sum into court after action.

By 2 & 3 Vict. c. 71, for regulating the police courts of the metropolis, it is enacted, (s. 53), that no action, suit, information, or other proceeding, shall be brought against any person for anything done, or omitted to be done, in pursuance of the Act, or in the execution of the powers thereof, unless twenty days' previous notice in writing shall be given, nor unless the action shall be commenced within three calendar months next after the act committed, or, in case of continuing damage, within three calendar months next after such damage has ceased, nor unless the action, etc., shall be brought in the county of Middlesex. And see s. 52.

And by 2 & 3 Vict. c. 93, for the establishment of county and district constables, it is provided (s. 8) that the chief constable, and other constables appointed under that Act, shall have all the powers, privileges, and duties throughout the county, and in all liberties, franchises, and detached parts of counties locally situate within the county, and also in any adjoining county, which any constable has within his constablewick, by virtue of the common law, or any statute made or to be made(*k*), and every protective provision of the 1 & 2 Wm. 4, c. 41 (*ante*, p. 710), is to be deemed to extend to the constables appointed under that Act. This last-mentioned statute is amended by 2 & 3 Vict. c. 93, which provides for the consolidation of county and borough police establishments, and of their mutual powers, privileges, and duties throughout counties and boroughs; and the 19 & 20 Vict. c. 69, for rendering more effectual the police in counties and boroughs, makes (s. 15) further provision for the consolidation of county and borough police, their powers, privileges, duties and responsibilities; and by 20 Vict. c. 2, s. 4, the statutes 2 & 3 Vict. c. 93, 3 & 4 Vict. c. 88, and 19 & 20 Vict. c. 69, are to be construed together as one Act.

821 *Protective clauses in favor of parties acting in the execution of Acts of Parliament.*—Most Acts of Parliament conferring special powers and authorities upon constables and others for the accomplishment of particular purposes, contain the usual protective clauses for the benefit of persons acting in the execution of the Act; making the cause of action local, and requiring the action to be commenced within a certain

(*k*) See Millor v. Leather, 1 Ell. & Bl. 623.

limited period, and notice of action to be given; and enabling the defendant to plead the general issue, and give the special circumstances of justification in evidence; and prohibiting the plaintiff from recovering after tender of demands. This is the case within the annual Mutiny Act, the Larceny Act(*l*), the Malicious Trespass Act (*ante*, p. 702), the Metropolitan Police Act (*ante* p 706), the Game Acts, the Statute for the Prevention of Cruelty to Animals(*m*), the Revenue, Excise, and Customs Acts, the Public Health Act, the Contagious Diseases (Animals) Act, 1869(*n*), and various statutes, enabling constables and private individuals to arrest persons found in the commission of a felonious or prohibited act.

822 *Limitation of actions, and notice of action.*—Protective clauses in Acts of Parliament in favor of constables and officers acting in the execution of their offices, or in favor of constables or of private individuals acting in the execution or in pursuance of particular Acts of Parliament, are intended for the benefit of those who want to act rightly, but have by mistake done wrong. It has been frequently observed by the courts, that the notice which is directed to be given to constables and officers before actions brought against them is of no use to them when they have acted within the strict line of their duty, and was only required for the purpose of protecting them in those cases where they intended to act within it, but by mistake exceeded it(*o*). "The object," observes Lord Ellenborough, "clearly is to protect persons acting illegally, but in supposed pursuance, and with a *bonâ fide* intention, of discharging their duty under the Act of Parliament. Where the law is not exceeded the protection is not required"(*p*). "It is not wanted," observes Jervis, C.J., "by those who are in the right, and have a perfect justification under the Act of Parliament, but by those who are in the wrong, in order that they may have an opportunity of tendering amends. If the defendant *bonâ fide* believed that he was acting in pursuance of the statute, and in the exercise of a legal right, that is all that is necessary to entitle him to notice of action. It is not necessary that he should know the Act, chapter, and verse." "Whether he had reasonable grounds for believing," further observes Maule, J., "that he was acting in pursuance of the statute, may be very fit to be considered when the question as to his *bonâ fides*, for a

(*l*) 24 & 25 Vict. c. 96, s. 113. See 32 & 33 Vict. c. 12, s. 10; c. 57, s. 6.
(*m*) Hopkins *v.* Crowe, 4 Ad. & E. 774.
(*n*) 32 & 33 Vict. c. 70, ss. 110-113.
(*o*) Per Ld. Kenyon, C.J., Greenway *v.* Hurd, 4 T. R. 555.
(*p*) Theobald *v.* Crichmore, 1 B. & Ald. 229.

case may be supposed, where there is such a want of reasonable ground for belief as to negative his *bonâ fides*"(*q*). In order to establish a claim to the statutory protection, it must appear that the act done was of that nature and description that the person doing it might reasonably suppose that the Act of Parliament gave him authority to do it(*r*). Where there is no reasonable ground for supposing that the act done is authorized, the party is not protected by the statute, and notice of action is not requisite(*s*).

Where the owner of property injured by the act of another, *bonâ fide* supposes that he had a right to give the person injuring his property into custody, and there is a fair color for the proceeding, he is entitled to notice of action, though he was altogether mistaken in the assertion of his rights, and cannot justify the trespass under the statute(*t*). The protection afforded by the statute is not confined strictly to the owner of the property injured, but is extended to all persons who had a *bonâ fide* belief, founded on some grounds, that they filled the character mentioned in the statute, and acted under that belief(*u*). If the plaintiff was found in the act of committing a malicious trespass, and the defendant had reasonable ground for believing that he had authority from the owner of the property to interfere, and take or give the plaintiff into custody, the defendant will be entitled to notice of action(*v*). But as the statute only authorizes the arrest of persons "found committing an offence within the statute," the defendant must, if the plaintiff was not taken *flagrante delicto*, show that a malicious trespass has been committed; that the plaintiff was on the spot; that there was reasonable ground for believing that the mischief was still going on, and that the plaintiff was the author or instigator of it(*w*).

"Several decisions have established that *bonâ fides* is not alone sufficient to bring a case within the privileges of these Acts of Parliament"(*x*). If there is no pretence or color for the notion that the

(*q*) Read *v.* Coker, 22 Law J., C. P. 205; 13 C. B. 861. Booth *v.* Clive, 10 C. B. 827; 2 L. M. & P. 283. Jones *v.* Howell, 29 Law J., Exch. 19. Smith *v.* Hopper, 9 Q. B. 1014. Cox *v.* Reid, 13 Q. B. 558.

(*r*) Rudd *v.* Scott, 2 Sc. N. R. 633. See Chamberlain *v.* King, *post*, p. 714.

(*s*) Cook *v.* Leonard, 6 B. & C. 356. Herman *v.* Seneshall, 13 C. B., N. S. 392; 32 Law J., C. P. 43. See Leete *v.* Hart, *post*, p. 714.

(*t*) Beachy *v.* Sides, 9 B. & C. 809. Norwood *v.* Pitt, 29 Law J., Exch. 127.

(*u*) Hughes *v.* Buckland, 15 M. & W. 346. Horn *v.* Thornborough, 3 Exch. 849. Chamberlain *v.* King, L. R., 6 C. P. 474.

(*v*) Kine *v.* Evershed, 10 Q. B. 150.

(*w*) Cann *v.* Clipperton, 10 Ad. & E. 588. Ballinger *v.* Ferris, 1 M. & W. 631. See Chamberlain *v.* King, *infra*.

(*x*) Ld. Denman, C.J., Smith *v.* Hopper, 9 Q. B. 1014. Cook *v.* Leonard, 6 B. & C. 351. Home *v.* Grimble, Car. & M. 23.

injurious act was done in execution of the statute under which the defendant shelters himself, he could have had no fair and reasonable ground for supposing that he was privileged and protected, and cannot, consequently, claim protection(*y*). "It would be wild work," observes Williams, J., "if a party might give himself protection by merely saying that he believed himself to be acting in pursuance of a statute. Still, protecting clauses of this sort would be useless if it were necessary that the person claiming the benefit of them should have acted quite rightly. The cases to which they refer must lie between a mere foolish imagination and a perfect observance of the statute"(*z*). And it is now quite settled, that if the defendant honestly believes in the existence of a state of things, which, if it had existed, would have justified his doing the acts complained of, he is entitled to notice, and the reasonableness of his belief, provided some grounds exist for an honest belief, is not material(*a*).

When the privilege is accorded to a person who fills a particular character and situation, the defendant, who claims the privilege on the ground that he acted in good faith on the belief that he was clothed with the official character, must show some reasonable ground for his belief. A general persuasion that the defendant had the power he claimed to exercise will not entitle him to the privilege; but a mistaken opinion on any of the facts which must exist to give him the power will not deprive him of his right to the protection of the statute(*b*). If, as a reasonably reflecting and careful person, he must have known that he was not clothed with the requisite official character, he has no ground for claiming the protection of notice of action(*c*).

823 *Notice of action to persons acting in execution of the Larceny Act.*—By 24 & 25 Vict. c. 96, s. 113(*d*), it is enacted that all actions for anything done in pursuance of that Act shall be laid and tried in the county where the fact was committed, and shall be commenced within six months after the fact committed, and notice in writing of such action and of the cause thereof shall be given to the defendant one month at least before the commencement of the action, and no plaintiff shall recover in any such action if tender of sufficient amends shall have been made before the action is brought. An ordinary arrest for

(*y*) Shatwell *v.* Hall, 10 M. & W. 525. Eliot *v.* Allen, 1 C. P. 87.
(*z*) Cann *v.* Clipperton, 10 Ad. & E. 589. Hopkins *v.* Crowe, 4 Ad. & E. 777. See Leete *v.* Hart, L. R., 3 C. P. 322.
(*a*) Chamberlain *v.* King, L. R., 6 C. P. 474.
(*b*) Kine *v* Evershed, 10 Q. B. 150.
(*c*) Lidster *v.* Borrow, 9 Ad. & E. 654. Booth *v.* Clive, 10 C. B. 835.
(*d*) See 32 & 33 Vict. c. 12, s. 10; c. 57, s. 6.

felony is not a thing done under the power or authority of this Act, but by virtue of the common law, which authorizes the arrest by private individuals of persons reasonably suspected of felony (*ante*, p. 578). Several new offences are however created and made criminally punishable by this statute, and sect. 103(*e*) enacts that any person found committing any offence punishable either upon indictment or summary conviction by virtue of the Act, except only the offence of angling in the day-time, may be immediately apprehended without warrant by any person, and forthwith taken, together with such property, if any, before some neighboring justice of the peace, to be dealt with according to law. To entitle a person to notice of action in respect of an arrest made under this section, it must be shown that at the time of the arrest he believed that the offence had been committed, and believed that he had found the person arrested in the act of committing it(*f*). Where, therefore, the offence, if any, was committed at 1 p.m., and the pursuit of the supposed offender not commenced till 3 p.m., it was held that the person arresting was not entitled to notice(*g*).

824 *Notice of action to persons acting in execution of the Metropolitan Police Act.*—The 79th section of the Metropolitan Police Act, 2 & 3 Vict. c. 47 (*ante*, p. 706), enacts that that Act is to be construed as one Act with the 10 Geo. 4, c. 44, the 41st section of which provides that notice of action must be given to all persons acting in the execution of that Act. If, therefore, a person has reasonable grounds for believing that he is entitled to arrest a person found committing an act prohibited by the Metropolitan Police Act, he is entitled to notice of action(*h*).

825 *Persons entitled to the benefit of the protection.*—A person who acts as a prime mover and principal in setting a constable in motion, who commands the constable, instead of being commanded by the latter, is not acting in aid of such constable, and is not entitled to the benefit of the statute(*i*); but he who acts only when required by the constable to assist him, is within the protecting clauses of the statutes.

826 *Length of notice of action.*—By 5 & 6 Vict. c. 97, s. 4, it is enacted, that in all cases where notice of action is required to be given, such notice shall be given one calendar month at least before any action shall be commenced, and such notice shall be sufficient, any Act to the contrary thereof notwithstanding. In the computation of the

(*e*) See 32 & 33 Vict. c. 12, s. 10.
(*f*) Roberts *v.* Orchard, 2 H. & C. 769; 33 Law J., Exch. 65.
(*g*) Downing *v.* Capel, L. R., 2 C. P. 461. See Leete *v.* Hart, *supra*.
(*h*) Danvers *v.* Morgan, 1 Jur., N. S. Exch. 1051.
(*i*) Staight *v.* Gee, 2 Stark. 449. See *post*, pp. 719, 720.

calendar month, the day of giving the notice and the day of suing out the writ are both to be excluded, for otherwise the intervening period is not a whole month as required by the statute(*j*). In the computation of time, the day of an act done or an event happening is to be excluded, for our law rejects fractions of a day. Therefore the act and the day are co-extensive, and the act cannot properly be said to be passed until the day is passed(*k*).

827 *Statement of the cause of action.*—A notice of action against a constable or officer should set forth the substantial ground of complaint against him, and should specify the time and place of the commission of the grievance(*l*). If the notice contains a reference to a wrong statute, the wrong reference may be rejected, as a reference to the statute requiring notice to be given is not an essential part of the notice(*m*); but the court in which the action is brought, if stated at all, should be correctly stated, particularly if several notices of action have been served(*n*). It is not necessary in the notice to name all the persons meant to be made parties to the action, nor to express whether it is intended to be brought against several persons jointly, or against one person only(*o*), but every plaintiff who sues must give notice of action, and every defendant must receive notice. Notice on behalf of two complaining parties, one of them being dead, was held not to support an action brought by the survivor(*p*). It is quite sufficient if the notice affords plain and substantial information of the cause of action; it is not necessary to describe in specific words precisely how the injury took place; nor is it in all cases material to state precisely where the cause of injury arose(*q*). When the statute requires the name and place of abode of the attorney of the party giving the notice to be indorsed on the notice, any material error or misstatement calculated to mislead will invalidate the notice; but if the information given is sufficiently specific and sufficiently accurate to enable the defendant to avail himself of the privileges and advantage that the Act intended to confer upon him, it will be sufficient, and it is for the

(*j*) Young *v.* Higgon, 6 M. & W. 49.

(*k*) Lester *v.* Garland, 15 Ves. 248. Webb *v.* Fairmaner, 3 M. & W. 476. See per Ld. Kenyon, C.J., in *Ex parte* Fallon, 5 T. R. 286.

(*l*) Breese *v.* Jerdein, 4 Q. B. 585. Martins *v.* Upcher, 3 Q. B. 668. Taylor *v.* Nesfield, 23 Law J., M. C. 169. Jones *v.* Nicholls, 13 M. & W. 361. See Burton *v.* Le Gros, 34 Law J., Q. B. 91.

(*m*) Macgregor *v.* Galsworthy, 1 C. & K. 8.

(*n*) Elstob *v.* Wright, 3 C. & K. 35.

(*o*) Bax *v.* Jones, 5 Pr. 168.

(*p*) Pilkington *v.* Riley, 3 Exch. 741.

(*q*) Jones *v.* Bird, 1 D. & R. 503; 5 B. & Ald. 837.

defendant to show that the error or misstatement, or insufficient description in the notice, has deprived him of the opportunity of taking advantage of the statute(*r*). The Christian name of the attorney need not be written out at full length(*s*), nor need his private residence be specified; for the place where an attorney abides for the purpose of carrying on his business is his place of abode within the meaning of the statute. "Either will do, the place of residence or the place of business"(*t*). Care must be taken to address the notice to the right parties, and to serve it in the proper quarter(*u*).

828 *Tender of amends.*—The statutes, requiring notice of action to be given, further provide, generally speaking, that no plaintiff shall recover for any wrongful proceeding in execution of the Act, if tender of sufficient amends shall have been made before action brought, and that if the jury at the trial are of opinion that the plaintiff is not entitled to damages beyond the sum tendered or paid into court, they are to give a verdict for the defendant, and the plaintiff cannot elect to be nonsuited.

829 *Payment of money into court.*—Every constable, officer, and private person who is entitled to the ordinary statutory protection, may, after action commenced, and before issue joined, pay money into court, and give evidence of such payment under the plea of not guilty by statute; and if at the trial the jury are of opinion that the plaintiff is not entitled to damages beyond the sum paid into court, they are bound to give a verdict for the defendant, and the plaintiff cannot elect to be nonsuited, and the defendant's costs are to be paid out of the money paid into court. If the plaintiff accepts such money in satisfaction of the damages, it is to be paid out of court to him, and the defendant is to pay him his taxed costs, and thereupon the action is to be determined(*v*).

830 *Parties to be made plaintiffs—Master and servant.*—The person actually assaulted is in general the only person who can maintain an action for damages, unless the assault has caused his death, in which case the action, if maintainable, must be brought by his personal representative (*ante*, p. 502); or unless the person assaulted is a servant, and the master has lost the benefit of his service by reason of the assault, in which case an action for damages is maintainable both by

(*r*) Osborn *v.* Gough, 3 B. & P. 554.
(*s*) James *v.* Swift, 4 B. & C. 681.
(*t*) Roberts *v.* Williams, 4 Dowl. P. C. 486; 2 C. M. & R. 561.
(*u*) Hider *v.* Dorrel, 1 Taunt. 384.
(*v*) See 11 & 12 Vict. c. 44, ss. 9, 11. And *ante*, pp. 710, 711.

the servant and the master; but the master cannot have an action for the beating unless the battery is so great that, by reason thereof, he loses the services of his servant, but the servant himself, for every small battery, shall have an action; and the reason of the difference is, that the master has not any damage by the personal beating of his servant, but by reason of the loss of service(*w*).

Where two have a joint interest they may, as we have seen, join in the same action, but they cannot do so where the wrong done to one is no wrong done to the other, as in the case of false imprisonment, or assault and battery, where what one man suffers is altogether different from the injury that accrues to another from the same cause(*x*).

831 *Of the parties to be made defendants.*—Every private unofficial person not acting in a judicial capacity, or in the authorized execution of legal process (*post*, chs. 14, 15), is responsible in damages for a wrongful imprisonment, ordered, directed, or authorized by him(*y*). He is not responsible for the orders or decrees of judges, and justices, before whom he has laid a complaint or made a charge; but if he officiously interferes and gives orders or directions to police constables for the imprisonment of the plaintiff, he will be responsible in damages if he is unable to excuse or justify the act. Where the defendant out of spite and ill-will, and for the purpose of getting the plaintiff out of the way, went to the place of rendezvous for the impress service near the Tower, and gave information there which caused the plaintiff to be seized by the pressgang and carried on board the tender, where he was detained until it was discovered that the information was false, and that he had never been in a ship before, it was held that the defendant was liable to an action for false imprisonment. "If a person," observes Lord Ellenborough, "causes another to be impressed, he does it at his own peril, and is liable in damages if that person proves not to have been subject to the impress service. If the defendant in this case had said that she believed the plaintiff had been a sailor, and was liable to be impressed, leaving it to the officer of the pressgang to make the necessary inquiries, and to act as he should think most advisable, she would not then have been amenable to this action, but she took upon herself positively to aver that the plaintiff was compellable to serve in a king's ship, and caused him to be siezed, and she must answer for the consequences"(*z*). Here the per

(*w*) Robert Mary's case, 9 Co. 905.
(*x*) Best, C.J., Barratt *v.* Collins, 10 Moore, 451.
(*y*) *Ante*, pp. 12, 699, 706.
(*z*) Flewster *v.* Royle, 1 Campb. 188.

son giving the information was the sole moving cause of the arrest, and herself trumped up a false story for the very purpose of wrongfully depriving the plaintiff of his liberty. There is a wide distinction, therefore, between this case and the case of a man who gives *bonâ fide* information, or makes a *bonâ fide* charge against another to a police-constable, leaving the constable to make inquiry into the circumstances, and act as he may think fit in the matter.

Where a felony had been committed in the house of the defendant, and the latter sent for the police and complained of the robbery, and stated various circumstances of suspicion which had come to his knowledge, and the policeman made inquiry into those circumstances, and on his own authority arrested the plaintiff and took him to a police-station, and at the same time requested the defendant to come to the station and sign the charge-sheet, which he did, charging the plaintiff with the felony, it was held that these facts did not render the defendant responsible for a trespass, as charging a person with an offence was a different thing from giving him into custody. "The arrest and detention of the plaintiff," observes Pollock, C.B., "were the acts of the police-officer; and the defendant did nothing more than he was, under the circumstances, bound to do, viz., sign the charge-sheet. He might have been liable, if he had acted *malâ fide*, but not otherwise. We ought to take care that people are not put in peril for making a complaint when a crime has been committed. If a charge be made *malâ fide*, there are ample means of redress"(*a*). But if the defendant gives the plaintiff in charge(*b*), or directs the policeman to take him into custody, he will be answerable in damages for the imprisonment if he cannot establish a justification(*c*), and the signing of a charge-sheet by the defendant is *primâ facie* evidence against him that he ordered and directed the arrest(*d*).

All persons aiding and assisting in the unlawful confinement of another are responsible in damages for the trespass, although they had nothing to do with the original arrest, and had no knowledge that the arrest and imprisonment were unlawful at the time they had a hand in it(*e*).

(*a*) Grinham *v.* Willey, 4 H. & N. 499; 28 Law J., Exch. 242. Brown *v.* Chapman, 6 C. B. 374. See Burns *v.* Erben, 40 N. Y. 463; Peckham *v.* Tomlinson, 6 Barb. 253; Von Latham *v.* Libby, 38 Barb. 339; Brown *v.* Chadsey, 39 Barb. 253.

(*b*) Hopkins *v.* Crowe, 4 Ad. & E. 774. Wheeler *v.* Whiting, 9 C. & P. 262.

(*c*) Warner *v.* Riddiford, 4 C. B., N. S. 200. Ashurst, J., in Morgan *v.* Hughes, 2 T. R. 231. Stonehouse *v.* Elliott, 6 ib. 315.

(*d*) Harris *v.* Dignum, 39 Law J., Exch. 28.

(*e*) Griffin *v.* Colman, 28 Law J., Exch. 137; 4 H. & N. 265. Pow *v.* Beckner, 3 Ired. 475. Vinton *v.* Weaver, 41 Me. 430.

If a person has been arrested and imprisoned under the authority of legal process which has been set aside as irregular, both the attorney who sued out the process and the client who set the attorney in motion are responsible in damages in an action for an assault and false imprisonment; for as the client gives to the attorney the right to represent him in the conduct of a cause, he is responsible for whatever the attorney does within the scope of his authority. The writ is a justification to the officer of the court who acted under it, and had no option but to obey it (*post*, ch. 14), but it is no protection, after it has been set aside, to the attorney who sued it out(*f*), or to the client who set the attorney in motion(*g*). But a person causing process to be issued is not responsible for anything that is done under it where the process is afterwards set aside, not for irregularity, but for error. In the one case a man acts irregularly and improperly without the sanction of any court. He therefore takes the consequences of his own unauthorized act. But where he relies upon the judgment of a competent court he is protected(*h*). And so if a judgment, regularly signed, be acted on, and the plaintiff taken on a *ca. sa.* issued under it, the defendant will not be liable if the judgment be set aside, not for irregularity or bad faith on the part of the defendant, but in the exercise of the equitable jurisdiction of the court, because judgment has been signed for too much, and as a favor to the plaintiff(*i*).

832 *Liability of a corporation to an action for an assault.*—An action for an assault and battery will lie against a corporation whenever the corporation can authorize the act to be done, and it has been done by their orders or authority(*j*). But it is otherwise if the corporation cannot legally authorize the act to be done. Where, therefore, a station-master arrests a person travelling by a railway in charge of a horse for not paying for the carriage of the horse on demand, and there was no power in the railway company by law to arrest a person

(*f*) Parsons v. Lloyd, 2 W. Bl. 844. See Sleight v. Leavenworth, 5 Duer, 122.

(*g*) Barker v. Braham, 2 W. Bl. 866; *post*, ch. 17, s. 2. Collett v. Foster, 2 H. & N. 361. See Deyo v. Van Valkenburgh, 5 Hill, 242; Chapman v. Dyett, 11 Wend. 31.

In Sleight v. Leavenworth, 5 Duer, 122, it was held that where an attorney for the plaintiff issued an execution against the body on a judgment clearly not authorizing it, the plaintiff was liable with the attorney for the false imprisonment, although wholly ignorant of the issuing of the execution.

(*h*) Williams v. Smith, 14 C. B., N. S. 596. Cooper v. Harding, 7 Q. B. 928. Philips v. Biron, 1 Str. 509. Lanett v. Hilts, 19 Barb. (N. Y.) 283.

"One who applies to a judge to issue an attachment for the arrest of another, and who receives and delivers it to a sheriff for service, is liable for the arrest in case the attachment is void for want of jurisdiction in the judge or for any other cause." Miller v. Adams, 52 N. Y. 409.

(*i*) Smith v. Sydney, L. R., 5 Q. B. 203.

(*j*) Goff v. Gt. North. Rail. Co., 30 Law J., Q. B. 148. *Ante*, p. 707-8.

for such non-payment, but only to detain the goods, it was held that no authority could be implied to the station-master, and that the railway company were not responsible(*k*). So if a foreman porter, in temporary charge of a station, or a ticket clerk, arrests a servant of the company, or a stranger, on a charge of stealing the company's goods, or robbing the till, as they have no implied authority so to arrest, the company are not responsible for it(*l*). So where one of the defendant's servants, a constable, *after* the conclusion of a scuffle in a station yard, wrongfully gave the plaintiff into custody, and all that the constable was authorized by the regulations of the company to do, was to interfere in any fight or affray occurring at any of the stations, for the purpose of stopping it, it was held that the company were not responsible(*m*). On the other hand, where the plaintiff, who refused to show his ticket, was removed from the station with unnecessary violence by order of the inspector, the company were held responsible(*n*).

833 *Subsequent ratification of wrongful imprisonment rendering the ratifying party responsible for the wrong.*—An action will lie against every person who has ratified and adopted an act of imprisonment effected or ordered by his servant or agent for his use and benefit, although the imprisonment was effected in the first instance without his knowledge. "But he that agreeth to a trespass after it be done, is no trespasser unless the trespass was done to his use or for his benefit(*o*), and then his agreement subsequent amounteth to a commandment"(*p*).

(*k*) Poulton *v.* Lond. and S.-Western Rail. Co., L. R., 2 Q. B. 534. In the Monument National Bank *v.* Globe Works (101 Mass. 59), Mr. Justice Hoar said: "No corporation is empowered by its charter to commit an assault and battery, yet it has frequently been held accountable in this commonwealth for one committed by its servants."

In Orr *v.* Bank of the United States (1 Ham. 36), it was held that an action cannot be maintained against a corporation aggregate for an assault and battery. A contrary doctrine was asserted in Brokaw *v.* New Jersey, etc., R. R. Co., 3 Vroom (N. J.), 328.

Where a railroad conductor attempted to enforce the payment of fare by seizing articles of property in the hands of a passenger the corporation were held liable to an action of assault and battery. Ramsden *v.* Boston & Albany R. R. Co., 104 Mass. 117.

In St. Louis, Alton & Chicago R. R. Co. *v.* Dalby (19 Ill. 353), it was held that while an action of trespass for assault and battery will lie against a railroad corporation, the corporation is not responsible for any excess of beating or violence used by its agents beyond what was necessary to carry out its orders. See also Isaacs *v.* Third Avenue R. R. Co., 47 N. Y. 122; Little Miami R. R. Co. *v.* Wetmore, 19 Ohio St. 110. This doctrine has not however been generally accepted in other States. But it must be observed that while a railroad corporation may be liable for the wilful assault of its servant on a passenger, it may not be liable for a similar assault on one to whom the company owes no duty arising from contract. See Goddard *v.* Grand Trunk R. R. Co., 57 Me. 202; Angell & Ames on Corp. s. 388.

(*l*) Edwards *v.* L. & N.-W. Rwy., L. R., 5 C. P. 445. Allen *v.* L. & S.-W. Rwy., L. R., 6 Q. B. 65.

(*m*) Walker *v.* South-Eastern Rway. L. R., 5 C. P. 640.

(*n*) *S. C.*

(*o*) See Walker *v.* South-East. Rwy., *supra*.

(*p*) 4 Inst. 317.

An imprisonment of a person liable to a railway company for not having paid his fare is an act for the benefit of the company, which may be ratified by the company(*q*).

834 *Declarations for an assault and false imprisonment.*—The venue or county where an action for an assault and false imprisonment is to be tried, must be stated in the margin of the plaintiff's declaration of his cause of action(*r*), and the venue is local and must be laid, as we have seen, within the county where the trespass or wrong was done, in all actions against justices of the peace, mayors, bailiffs, constables, tax-collectors, churchwardens, overseers and their deputies, and other public officers, for anything done by them touching or concerning their offices(*s*), and in all actions for anything done under the Malicious Trespass Act(*t*). When the action is brought pursuant to a notice of action (*ante*, p. 712), and the action is not maintainable without notice of action, the declaration must disclose the same cause of complaint as is contained in the notice(*u*).

The short form of declaration in a common case of false imprisonment given in the schedule of the Common Law Procedure Act, 15 & 16 Vict. c. 76, merely alleges "that the defendant assaulted and beat the plaintiff, gave him into custody to a policeman, and caused him to be imprisoned in a police office."

835 *What may be given in evidence under the plea of not guilty.*—Under the plea of not guilty in an action for an assault, or battery, or wounding, those facts only can be given in evidence which tend to show that the defendant did not do the act complained of(*v*). Any defence which admits the trespass and seeks to show the fact of its being excusable by some accident, or justifiable, is matter for a special plea(*w*). If the act complained of has been done by the leave and license or permission of the plaintiff, it is not an assault, and the leave and license may consequently be given in evidence under the plea of not guilty. If two persons agree to play at cricket together,

(*q*) East Counties Rail. Co. *v.* Broom, 6 Exch. 327. Goff *v.* Gt. North. Rail. Co., *ut sup.*

(*r*) Reg. Gen. Hil. T. 16 Vict; 1 Ell. & Bl. App. lxxix. R. 4.

(*s*) 21 Jac. 1, c. 12, s. 5. Touching or concerning their offices means, that they were intending to act under color of their office, although by error and mistake they did not in point of fact do so. Staight *v.* Gee, 2 Stark. 448; *ante*, p. 712; and see *post*, ch. 15.

(*t*) *Ante*, p. 711. See Thomas *v.* Saunders, 5 B. & Ad. 462.

(*u*) Elstob *v.* Wright, 3 C. & K. 89. A complaint for an arrest and false imprisonment need not aver that the acts complained of were done illegally, wrongfully and without competent authority; nor that the imprisonment was malicious and without probable cause. Gallimore *v.* Ammerman, 39 Ind. 333. Colter *v.* Lower, 35 Ind. 285. Andrews *v.* Stone, 10 Minn. 72.

(*v*) Pearcy *v.* Walter, 6 C. & P. 232. Jewett *v.* Goodall, 19 N. H. 562; Meeds *v.* Carver, Ired. 273; Lair *v.* Abrams, 5 Blackf. 191.

(*w*) Hall *v.* Fearnley, 3 Q. B. 921.

and the one strikes the other with the ball in the course of the game, this is not an assault, for "it is a contradiction in terms to say that the defendant assaulted the plaintiff by the leave and license or permission of the latter"(*x*).

If two persons proceeding through the streets on foot or on horseback, or driving carriages and horses, run or drive against each other, the question as to which of them caused the collision, or struck the person of the other, is raised by the general issue of not guilty(*y*). If both are in fault and both caused the collision, so that it is impossible to fasten the wrong and injury exclusively upon the one or the other, the evidence tending to establish such a state of facts is likewise admissible under the plea of Not guilty. If the act complained of is the exclusive act of the defendant; if he drives against a horse or carriage which is standing still in the street, or over a drunken man who is lying down on the road, or over a person who has fallen from the kerb or footway into the carriageway, and the defendant seeks to set up some excuse or justification on the ground that it was an inevitable accident, he must plead the facts specially on the record(*z*). But if he seeks to show that the act was not his act, and that he was not a voluntary agent in the matter, the evidence pointing to such a result is admissible under the plea of not guilty. Thus, if a horse being suddenly frightened by a flash of lightning or a clap of thunder runs away with his rider, and the latter loses all power and control over the animal, and is unable to guide him, the injuries inflicted by the ungovernable horse under such circumstances are not injuries done by the rider, and the latter is in substance not guilty of committing them(*a*). It may be proved, under the plea of not guilty, that the defendant is an officer of the Queen and government, and that the assault was committed by him whilst he was acting in discharge of his public duty as an officer carrying out the orders of his government(*b*).

Every defence which goes to show that the imprisonment complained of was not the act of the defendant is admissible under the plea of not guilty; such as, that the defendant went before a magistrate and preferred his complaint to the magistrate, who thereupon issued his war-

(*x*) Christopherson *v.* Bare, 11 Q. B. 477.
(*y*) Pearcy *v.* Walter, 6 C. & P. 232.
(*z*) Hall *v.* Fearnley, 3 Q. B. 919. Knapp *v.* Salisbury, 2 Campb. 500. Cotterill *v.* Starkey, 8 C. & P. 691.
(*a*) Gibbons *v* Pepper, 2 Salk. 637; 1 Ld. Raym. 38; 4 Mod. 404.
(*b*) Baron *v.* Denman, 2 Exch. 167.

rant for the apprehension of the defendant(*c*), or that the defendant accused the plaintiff of embezzlement, and that the plaintiff insisted on having the charge investigated, and accompanied the defendant to a magistrate, who, on hearing the charge, ordered the plaintiff to be placed in the dock as a prisoner, to answer it, and detained him until the charge had been heard, and then dismissed him(*d*).

836 *Not guilty by statute.*—Acts of Parliament containing clauses for the protection of persons intending to act in the execution of the statute provide, as we have seen (*ante*, p. 709), that the defendant may give the Act and the special matter in evidence under the general issue, and that the acts were done in pursuance or by the authority of the Act, and that if they shall appear to be so done, the jury shall find for the defendant. To enable a defendant to avail himself of the plea of not guilty by statute, and to give special circumstances of justification or excuse in evidence under it, he must show that the act complained of was done under the authority and pursuant to the powers and provisions of the statute upon which he relies(*e*), or if the privilege is given to persons holding certain offices, and being clothed with a certain official character, it must be shown that he had, in point of fact, been appointed to the office(*f*). In every case in which a defendant pleads the general issue, intending to give the special matter in evidence by virtue of an Act of Parliament, he must insert in the margin of the plea the words, "by statute," together with the year or years of the reign in which the Act of Parliament upon which he relies was passed, and the chapter and section of the Act, and must specify whether the Act is public or otherwise, or he will not be entitled to the benfit of the Act; and such memorandum must be inserted in the margin of the issue and of the *nisi prius* record(*g*).

837 *Plea setting forth a previous hearing and dismissal by magistrates.*—By 24 & 25 Vict. c. 100, s. 42 (which is for the most part a re-enactment of the 9 Geo. 4, c. 31, s. 27), it is enacted, that where any person shall unlawfully assault or beat any other person, two justices, upon complaint by or on behalf of the party aggrieved, may hear and determine such offence; and (s. 44) if the justices, upon the hearing of any such case of assault and battery upon the merits, where the complaint was preferred by or on behalf of the party aggrieved, shall deem the

(*c*) Barber *v.* Rollinson, 1 Cr. & M. 330. West *v.* Smallwood, 3 M. & W. 418.
(*d*) Brown *v.* Chapman, 6 C. B. 374.
(*e*) Witham Nav. Co. *v.* Padley, 4 B. & Ad. 69.
(*f*) Bush *v.* Green, 4 B. N. C. 49.
(*g*) Reg. Gen. 16 Vict.; 1 Ell. & Bl. App. lxxxii.

offence not to be proved, or shall find the assault or battery to have been justified, or so trifling as not to merit punishment, and shall dismiss the complaint, they shall forthwith make out a certiffcate under their hands, stating the fact of such dismissal, and shall deliver such certificate to the party against whom the complaint was preferred. And if any person (s. 45) against whom any such complaint shall have been preferred by or on behalf of the party aggrieved shall have obtained such certificate, or having been convicted shall have paid the whole amount adjudged to be paid, or suffered the imprisonment awarded, such party shall be released from all further proceedings, civil or criminal, for the same cause. If a certificate under this statute is relied upon as a defence, it must be specially pleaded(*h*), and shown to have been granted on one of the grounds specified in the Act(*i*). If the magistrate merely orders the accused to enter into recognizances to keep the peace and pay the recognizance fee, that will be no bar to an action within the 45th section(*k*). Under 9 Geo. 4, c. 31, s. 27, if the plaintiff, after the defendant had been summoned before justices, and had appeared and pleaded "Not guilty," withdrew his complaint without offering any evidence, and the charge was dismissed, or if he gave notice that he did not mean to attend the hearing, and the defendant attended and claimed to have the information dismissed, the defendant was entitled to a certificate in the terms of the statute, which was a bar to any subsequent action for the same assault(*l*); but this has been altered by the above statute, which requires the hearing to be on the merits, in order to entitle the defendant to the certificate. If the magistrate takes cognizance of the complaint and decides it to be frivololous, he is bound forthwith to grant a certificate that he has so decided. The granting or withholding the certificate by the magistrate is not discretionary. The defendant is entitled to it *de jure*, and whether the complainant was present or absent at the time of the grant of such certificate is wholly immaterial(*m*). When the complaint has been once duly made before justices, it cannot be withdrawn, and further proceeding upon it discontinued by arrangement between the parties, if the justices think fit to oppose such an arrangement(*n*)

(*h*) Harding *v.* King, 6 C. & P. 427.
(*i*) Skuse *v.* Davis, 10 Ad. & E. 639.
(*k*) Hartley *v.* Hindmarsh, L. R., 1 C. P. 553.
(*l*) Tunnicliffe *v.* Tedd, 5 C. B. 553. Vaughton *v.* Bradshaw, 9 C. B., N. S. 115. Bradshaw *v.* Vaughton, 30 Law J., C. P. 93.
(*m*) Hancock *v.* Somes, 28 Law J., M. C. 196.
(*n*) Reg. *v.* Hawkins, 2 N. R., p. 62.

The word "forthwith," in s. 44 of the statute, does not mean that the certificate is to be granted forthwith upon the dismissal of the complaint by the magistrate, but forthwith upon the application of the party entitled to the certificate. It is not the duty of the magistrate to grant the certificate not being asked for it, but when the magistrate is asked for it he cannot refuse it; it is a record merely of what he has judicially decided, and is demandable *ex debito justitiæ*. If, therefore, justices refuse to grant the certificate on application made to them, the Court of Queen's Bench will grant a mandamus to compel them to do it(*o*).

838 *Pleas of justification.*—When there are several distinct and separate assaults charged in the declaration, the defendant, by his plea of justification, must cover and answer the whole chain of trespasses, and show the circumstances leading to each assault, and exonerating the defendant from liability(*p*), and if any one of the long series of wrongful acts is left unanswered, the plaintiff will be entitled to a verdict(*q*). But where the attendant circumstances afford mere matter of aggravation and amplification of the original trespass, and do not in themselves constitute substantive trespasses, it is sufficient if the defendant justifies the principal act(*r*).

When the trespass is a continuing trespass, consisting of a series of acts connected together, but extending over a considerable interval of time, the acts constituting the entire trespass are divisible, and the defendant may plead not guilty to, or traverse, some of them, and justify others. Where the plaintiff's declaration alleged that the defendant entered the plaintiff's house and stayed therein four days, and the defendant set up a justification entitling him to enter and stay two days, to which the plaintiff replied, denying his right to enter at all, but alleging that if he had the right, it was to stay two days only, and that he had stayed two days more without any color of authority, it was held that the trespass was divisible, and the replication good(*s*). If there are divers counts in the plaintiff's declaration embracing divers assaults, and the defendant by his plea narrows them all to one assault, and justifies that, and the plaintiff takes issue, he is confined to the assault set forth in the plea(*t*).

(*o*) Costar *v.* Hetherington, 28 Law J., M. C. 196, overruling Rex *v.* Robinson, 12 Ad. & E. 672.
(*p*) M'Curday *v.* Driscoll, 1 C. & M. 618. Stammers *v.* Yearsly, 10 Bing. 35. Noden *v.* Johnson, 16 Q. B. 218.
(*q*) Bush *v.* Parker, 4 M. & Sc. 558; 1 B. N. C. 72.
(*r*) Taylor *v.* Cole, 1 H. Bl. 561.
(*s*) Loweth *v.* Smith, 12 M. & W. 582. Worth *v.* Terrington, 13 M. & W. 780.
(*t*) Gale *v.* Dalrymple, Ry. & M. 118. See Berry *v.* Borden, 7 Blackf. 384.

839 *Defence of neighbors and friends.*—If the assault complained of was committed by the defendant in the necessary and proper defence of a third party from the unlawful violence of the plaintiff, it is justifiable under a plea to the effect that the plaintiff first assaulted *A B*, being the child or relative, wife, husband, servant, apprentice, neighbor, or friend of the defendant, and was continuing to do so, whereupon the defendant laid his hands on the plaintiff to defend the said *A B* against the plaintiff, and to prevent him from further assaulting the said *A B*(*u*).

840 *Moderate correction by parents, schoolmasters, masters of ships, etc.*—To an action of trespass for an assault and battery, it is a good plea to plead that the person assaulted was the son of the plaintiff, and was an infant within the age of twenty-one years, still domiciled under the paternal roof, and under the care and control of the plaintiff, that he behaved saucily and contumaciously to the plaintiff, and refused to obey his lawful commands, whereupon the plaintiff moderately and in a reasonable manner chastised his said son(*x*); or that the plaintiff was the apprentic of the defendant, and conducted himself improperly and saucily, wherefore the defendant moderately chastised him, as he had a right to do(*y*); or that the defendant was the head master of a school or college of which the plaintiff was a pupil, that the plaintiff was a member of a society or combination of pupils for purposes subversive of the discipline of the school, wherefore, etc.(*z*); or that the defendant at the time of the assault was the captain of a merchant vessel trading to China, and the plaintiff was a mariner on board the vessel, serving under the order of the defendant; that the plaintiff conducted himself in a mutinous and disorderly manner, and refused to obey the lawful and necessary commands of the defendant, whereupon the defendant caused the plaintiff to be moderately and properly corrected and flogged(*a*); or that the plaintiff was a passenger by the ship of which the defendant was captain, and that by reason of the plaintiff's conduct it became necessary for the preservation of the dis-

(*u*) Leward *v.* Baseley, 1 Ld. Raym. 62; 1 Salk. 407; 3 Salk. 46. As to how far a plea of this nature is available, see Obier *v.* Neal, 1 Houston (Del.), 449; Hill *v.* Rogers, 2 Clarke (Iowa), 67.

(*x*) Winterburn *v.* Brooks, 2 C. & K. 16.

(*y*) Penn *v.* Ward, 2 C. M. & R. 338.

(*z*) Fitzgerald *v.* Northcote, 4 F. & F. 656. As to the powers of a schoolmaster generally, see Ibid. in notes, p. 663. As to how far corporeal punishment by a schoolmaster is justifiable, see Cooper *v.* McJunkin, 4 Ind. 290.

(*a*) Lamb *v.* Burnett, 1 Cr. & J. 295. See Brown *v.* Howard, 14 Johns. 119; Sampson *v.* Smith, 15 Mass. 365; Heming *v.* Ball, 1 Bay, 3; Aertsen *v.* Brady, Bee, 161.

That the master of a hired servant on land cannot justify corporeal punishment, see Matthews *v.* Terry, 10 Conn. 455.

cipline or for the safety of the ship, to imprison him(*b*). If the chastisement or imprisonment has been immoderate, the excess must be specially replied.

841 *Pleas of justification of imprisonment.*—If a man does any act which is *primâ facie* a trespass, he must, unless the act were done under the authority of an Act of Parliament enabling the defendant to plead the general issue and give the special matter of justification in evidence under it, justify the act, by showing the authority under which he acted; as, for instance, if there be a judgment against a person, and process is issued to take him in execution, and the sheriff takes him on that process, he must show his authority for so doing(*c*). A plea of justification of imprisonment, ordered or directed, or authorized, by a private individual, on the ground that a felony had been committed, and that there was reasonable ground to suspect the plaintiff of having committed it, must state the particulars of the felony, and set forth circumstances showing a reasonable ground of suspicion against the plaintiff, and reasonable and probable cause for the arrest, in order that the judge may determine whether they amount to reasonable and probable cause, not merely for suspecting, but for arresting and imprisoning the plaintiff(*d*). The question of reasonable and probable cause is a question for the judge and not for the jury(*e*).

"Probable cause," observes Tindal, C.J., "is, no doubt, a question of law, and within the province of a judge to decide; but the jury must not only find the facts which are supposed to constitute probable cause, but they are also warrantsd in forming their conclusion from those facts, and it is frequently difficult to draw the line between matter of law and matter of fact"(*f*). If, in the opinion of the judge, founded on facts proved before a jury, there was reasonable ground for

(*b*) Aldworth *v.* Stewart, 4 F. & F. 967.

(*c*) As to pleas of justification of imprisonment under color of legal process, see *post*, ch. 14.

(*d*) Maule, J., West *v.* Baxendale, 9 C. B. 152. Broughton *v.* Jackson, 21 Law J., Q. B. 265. Mure *v.* Kaye, 4 Taunt. 34. See Lander *v.* Miles, 3 Oreg. 35; Wasson *v.* Canfield, 6 Blackf. 406. Probable cause which will justify a criminal accusation, is defined to be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in his belief that the person accused is guilty of the offence with which he is charged. Carl *v.* Ayres, 53 N. Y. 14. Munns *v.* Dupont, 3 Wash. C. C. 37. Foshay *v.* Furguson, 2 Denio, 617. Bacon *v.* Towne, 4 Cush. 218. Driggs *v.* Burton, 44 Vt. 124. Cooper *v.* Utterback, 37 Md. 283. Stansbury *v.* Fogle, 37 Md. 369. Ross *v.* Innis, 35 Ill. 487. Wheeler *v.* Nesbitt, 24 How. (U. S.) 544. Center *v.* Spring, 2 Clarke (Iowa), 393. Mowry *v.* Whipple, 8 R. I. 360. Shaul *v.* Brown, 28 Iowa, 37. Shafer *v.* Loucks, 58 Barb. 426.

(*e*) Hailes *v.* Marks, 30 Law J., Exch. 392. See Grant *v.* Moore. 29 Cal. 644; Kidder *v.* Parkhurst, 3 Allen (Mass.), 393; Cloon *v.* Gerry, 13 Gray (Mass.), 201; Besson *v.* Southard, 10 N. Y. 236.

(*f*) Davis *v.* Russell, 2 M. & P. 604; 5 Bing. 354. See Malone *v.* Murphy, 2 Kans. 250; Burkett *v.* Lanata, 15 La. An. 337; Israel *v* Brooks, 23 Ill. 575; Wade *v.* Walden, 28 Ill. 425.

suspecting either that the plaintiff had committed, or that he was about to commit, a felony, he cannot recover damages from a constable for arresting and detaining him, although no felony had in fact been committed(*g*). The fact that the defendant acted upon hearsay evidence alone in causing the plaintiff to be arrested, if such evidence could easily have been tested, is one element—though not a conclusive one, if the informant be a trustworthy person, or other circumstances exist—in considering the question of reasonable and probable cause(*h*).

A justification of an imprisonment on the ground that the plaintiff had committed felony, and an abandonment of the plea at the trial, or a failure to prove it, is evidence of malice, and a great aggravation of the original wrong; but a justification of a false imprisonment on the ground that a felony had been committed, and that the defendant had reasonable and probable cause to suspect that the plaintiff had been guilty of it, is very different. Such a justification is in the nature of an apology for the defendant's conduct(*i*).

An imprisonment cannot be justified on the ground that the plaintiff unlawfully entered the defendant's house and made a great noise and disturbance therein, and would not depart when requested so to do, whereupon the defendant sent for a police-officer and gave the plaintiff into custody(*k*). To make the plea good, there must be a direct allegation, either of a breach of the peace, continuing at the time of the giving of the plaintiff into custody, or that a breach of the peace had been committed, and that there was reasonable ground for apprehending its renewal(*l*). In an action for an assault and false imprisonment the defendant justified, on the ground that he was possessed of a house and shop, that the plaintiff was unlawfully therein, and was requested to depart, which he refused to do, whereupon the defendant gently laid hands on him to remove him, that the plaintiff then assaulted the defendant in the presence of a police-officer, and was given into custody. At the trial it was not shown that any assault had been committed by the plaintiff upon the defendant, and it was held that the imprisonment was unlawful, and the plaintiff entitled to damages(*m*).

If the defendant pleads that he had a right to imprison the plaintiff for a certain reasonable time to preserve the peace, or prevent him

(*g*) Beckwith *v.* Philby, 6 B. & C. 635; 9 D. & R. 487.
(*h*) Perryman *v.* Lister, L. R., 8 Exch. 197; 4 Engl. & Ir. App. 521.
(*i*) Warwick *v.* Foulkes, 12 M. & W. 509.
(*k*) Green *v.* Bartram, 4 C. & P. 308. Rose *v.* Wilson, 8 Moore, 392; 1 Bing. 353.
(*l*) Grant *v.* Moser, 5 M. & Gr. 123; 6 Sc. N. R. 46. Price *v.* Seeley, 10 Cl. & Fin. 28.
(*m*) Reece *v.* Taylor, 4 N. & M. 469.

from disturbing divine service, the time is divisible, and the plaintiff may by his replication deny that there was any cause for imprisoning him, but that if there was, the imprisonment was for a longer time than was justified by such cause(*n*).

If the defendant relies upon the fact of his being a superior officer in the army or navy, and of his having imprisoned the plaintiff in order to bring him before a court-martial, and that he did so bring him, and relies on the sentence of the court-martial as conclusive, he should plead the facts by way of estoppel, and not leave them at large to be considered by a jury(*o*). However, even though an officer be arrested and kept in confinement, for an intentional act of discourtesy to his superior officer, for several days, and is not ultimately brought to a court-martial, no action lies if the matter of complaint arises between military men subject to the Articles of War, and be fairly cognizable before a military tribunal(*p*), even though it be done maliciously, and without reasonable or probable cause(*q*).

842 *Evidence at the trial—Proof of an assault.*—In order to prove an assault, the plaintiff must show that he was actually struck by the defendant, or that the defendant threatened to strike him (see *ante*, pp. 689, 690), or to inflict some injury upon him, having the means of carrying that threat into effect. Where one assault only is charged in the plaintiff's declaration of his cause of complaint, the plaintiff is confined to the proof of one assault(*qq*). He is not bound to the precise time stated in the declaration, but may prove an assault on another day(*r*). Having, however, proved one assault, he cannot go on to prove other prior or subsequent distinct assaults, for the purpose of enhancing the damages or selecting the best to rely upon(*s*). If the assault is of a continuing nature, and consists of a series of wrongful acts of violence, following one upon the other, so as to constitute one continued wrongful act, then the wrong being of a continuous nature, the various acts of violence may be given in evidence as constituting one continuing trespass(*t*).

(*n*) Worth *v.* Terrington, 13 M. & W. 789.

(*o*) Hannaford *v.* Hunn, 2 C. & P. 148.

(*p*) Dawkins *v.* Lord Rokeby, 4 F. & F. 806.

(*q*) Dawkins *v.* Lord Paulet, L. R., 5 Q. B. 94, Cockburn, C.J., diss.; and see Keighly *v.* Bell, 4 F. & F. 763; and *post*, p. 752.

(*qq*) Gillon *v.* Wilson, Monr. 217.

(*r*) Cheasley *v.* Barnes, 10 East, 80. Polkinhorn *v.* Wright, 8 Q. B. 206; Litt. sect. 485. Palmer *v.* Skillenger, 5 Harring. (Del.) 171.

(*s*) Stante *v.* Pricket, 1 Campb. 472; Bull. N. P. 86. English *v.* Purser, 6 East, 395. Taylor *v.* Smith, 7 Taunt. 156.

(*t*) Monkton *v.* Ashley, 6 Mod. 38; 2 Salk. 638. Burgess *v.* Freelove, 2 B. & P. 425.

843 *Proof of an arrest and imprisonment.*—It is not necessary in order to constitute an arrest, that there should be a power of detention of the person arrested. If, therefore, an officer, in the execution of civil process, touches a person through a window without breaking the premises, this is a good arrest(*u*). In order to establish the fact of an imprisonment, the plaintiff must prove that some restraint was placed upon his personal freedom by the defendant (see *ante*, p. 697).

A *primâ facie* case will be established against a defendant in an action for false imprisonment, by showing that the plaintiff was taken into custody by a policeman, and that the defendant came down to the station-house and signed a charge-sheet accusing the plaintiff of having committed felony(*v*). It is not absolutely necessary to show that the defendant gave any personal orders or directions to the police touching the arrest, in order to establish a *primâ facie* case against the defendant. If it is shown that the defendant made a charge against the plaintiff, and the surrounding circumstances, and the conduct and acts of the defendant or his servants, raise a fair and reasonable presumption that the wrongful act was ordered or directed to be done by the defendant, there is enough to call upon him to answer the charge and rebut the presumption; and if no evidence is offered by him for that purpose the jury are justified in finding him guilty(*x*). If the defendant charges the plaintiff with a felony in the presence of a policeman, and stands by and sees the plaintiff taken into custody, and is silent, this is evidence of the defendant's having authorized or directed the policeman to act in the matter(*y*).

A declaration alleging that the defendant caused the plaintiff to be arrested and imprisoned without reasonable or probable cause, on a false and malicious charge of felony, is a declaration in trespass for an assault and false imprisonment, and not an informal count for a malicious prosecution, and, therefore, requires no evidence of malice or want of reasonable and probable cause(*z*).

844 *Evidence for the defence.*—The facts which may be given in evidence under the plea of not guilty, to rebut a *primâ facie* case on the part of the plaintiff, have already been pointed out (*ante*, pp. 722–724). If the defendant relies upon a plea of *son assault demesne* (*ante*, p. 695), he must show an assault by the plaintiff commensurate with the assault

(*u*) Anon. 7 Mod. 8. Sandon *v.* Jervis, Ell. Bl. & Ell. 935; 28 Law J., Exch. 156. Arrest upon mesne process is abolished by 32 & 33 Vict. c. 62.

(*v*) Harris *v.* Dignum, *ante*, p. 719.

(*x*) Glynn *v.* Houston, 2 Sc. N. R. 554.

(*y*) Warner *v.* Riddiford, 4 C. B., N. S. 200. See Grinham *v.* Willey, *ante*, p. 719.

(*z*) Chivers *v.* Savage, 5 Ell. & Bl. 697. Brandt *v.* Craddock, 27 Law J., Exch. 314.

charged upon the defendant; for if the assault proved to have been committed by the plaintiff is trifling, and altogether disproportioned to the assault committed by the defendant, and forms no excusable or justifiable cause for it, the plaintiff will be entitled to a verdict(*a*). Where, under a plea of *son assault demesne*, the defendant proved that the plaintiff got off his horse, and held up his stick, and offered to strike the defendant, and the latter thereupon gave him a beating, it was held that a moderate battery was, by reason of the provocation, justifiable, and that, if the plaintiff relied upon the fact of the defendant's having beaten him more violently than he ought to have done, the excessive beating should have been replied, and specially set forth on the record(*b*). If the plaintiff complains of having been struck with a stick by the defendant, the defendant may, under a plea of *son assault demesne*, show that the plaintiff first struck him with his fist(*c*).

If the defendant rests his defence upon a plea of the previous hearing and dismissal of the charge by magistrates (*ante*, p. 724), he must produce the certificate of the fact of the dismissal, signed by two justices, which will be *primâ facie* evidence of the dismissal of the complaint, without proof of the genuineness of the signatures of the magistrates who have signed it(*d*). If the defendant relies upon a conviction under the same statute, the record of the conviction, or an examined copy of it, must be produced(*e*). If the defendant relies upon some plea of justification or excuse (*ante*, pp. 726–730), he must prove so much of his plea as constitutes an answer to the assault to which it is pleaded. If he does that, it is enough, and he is not bound to prove the residue of his plea(*f*). If the plea of justification consists of two facts, each of which would, when separately pleaded, amount to a good defence, the plea of justification will be supported if one of these facts only be found by the jury(*g*).

When the defendant justifies in defence of his possession of realty or personalty, he must prove the fact of his possession at the time he

(*a*) Dean *v.* Taylor, 11 Exch. 68. Cockcroft *v.* Smith, 1 Salk. 641. Littledale, J., Reeve *v.* Taylor, 4 N. & M. 470. Scribner *v.* Beach, 4 Denio. 448. See Harrison *v.* Harrison, 43 Vt. 417.

(*b*) Dale *v.* Wood, 7 Moore, 33. Penn *v.* Ward, 2 C. M. & R. 338. See Bennett *v.* Appleton, 25 Wend. 371; Fisher *v.* Bridges, 4 Blackf. 518; Dole *v.* Erskine, 35 N. H. 503; Philbrick *v.* Foster, 4 Ind. 442; Gaither *v.* Blowers, 11 Md. 536; Bartlett *v.* Churchill, 24 Vt. 218; Frederick *v.* Gilbert, 8 Barr. 454; Curtis *v.* Carson, 2 N. H. 539; Collier *v.* Moulton, 7 Johns. 109.

(*c*) Blunt *v.* Beaumont, 2 Cr. M. & R. 412. Oakes *v.* Wood, 3 M. & W. 150.

(*d*) 8 & 9 Vict. c. 113, s. 1; *post*, ch. 21.

(*e*) Hartley *v.* Hindmarsh, L. R., 1 C. P. 553.

(*f*) Atkinson *v* Warne, 1 C. M. & R. 827.

(*g*) Spilsbury *v.* Micklethwaite, 1 Taunt. 149.

committed the assault, and that the assault was of a defensive and not of an offensive character(*h*).

845 *Damages recoverable.*—"The court," observes Tindal, C.J., "never interferes with the discretion of the jury as to the amount of damages for an assault and false imprisonment, unless they are grossly excessive, or clearly founded upon a mistaken or improper view of the matter"(*i*). The circumstances of time and place as to when and where the assault was committed, and the degree of personal insult, must be considered in estimating the nature of the offence and the amount of damages. "It is a greater insult to be beaten upon the Royal Exchange than in a private place"(*k*). When the assault is accompanied by a false charge, affecting the honor, character, and position in society, of the plaintiff, the offence will, of course, be greatly aggravated, and the damages proportionably increased; and if the plaintiff has been

(*h*) Dean *v.* Hogg, 10 Bing. 349. See *ante*, p. 698.

(*i*) Edgell *v.* Francis, 1 Sc. N. R. 121. Huckle *v.* Money, 2 Wils. 206. In assessing the damages the jury may properly consider the effect which a finding of trivial damages may have in encouraging a disregard of the laws, and disturbance of the public peace. Beach *v.* Hancock, 7 Foster (N. H.), 223.

The jury are not confined to the pecuniary loss proven; but may take into consideration every circumstance of the act which injuriously affected the plaintiff, not only in his property but in his person, his peace of mind, and his individual happiness. Cox *v.* Vanderkleed, 21 Ind. 164. Taber *v.* Hutson, 5 Ind. 322.

If there were circumstances of outrage and insult attending the assault and battery which wound the feelings, and tend to lower the party injured in the estimation of society, the jury may consider these circumstances in awarding damages. Barnes *v.* Martin, 15 Wis. 240. See Dalton *v.* Beers, 38 Conn. 529.

And in all cases where the assault is wilful, vindictive damages may be given. Reeder *v.* Purdy, 48 Ill. 261. Whether the defendant is a natural person or a corporation. Atlantic & Great Western R. R. Co. *v.* Dunn, 19 Ohio St. 162. Goddard *v.* Grand Trunk R. R. Co., 57 Me. 202.

But where the assault and battery is committed under the provocation of highly insulting language, vindictive damages should not be given unless in case of cruel and outrageous battery. Donnelly *v.* Harris, 41 Ill. 126.

If exemplary damages are claimed by the plaintiff the defendant should be allowed to show to the jury the true relations of the parties, in order that they may determine how far the act was wanton, malicious, vindictive or unprovoked, or how far extenuated by the conduct, declarations or provocations of the plaintiff. Prentiss *v.* Shaw, 56 Me. 427.

In estimating damages, the jury may also take into consideration the poverty of the plaintiff or the wealth of the defendant. Buckley *v.* Knapp, 48 Mo. 152. Pendleton *v.* Davis, 1 Jones' Law (N. C.), 98. Belknap *v.* Boston, etc., R. R Co., 49 N H. 358. But see Guengerech *v.* Smith, 34 Iowa, 348. And may give exemplary or punitive damages where the defendant has been previously convicted and fined, for the same act, in a criminal proceeding. Jefferson *v.* Adams, 4 Harring. 321. Corwin *v.* Walton, 18 Mo. 71. Hoadley *v.* Watson, 45 Vt. 289. Cook *v.* Ellis, 6 Hill, 466. But see Cherry *v.* McCall, 23 Ga. 193. If there has been a former trial of the same cause, in which no verdict was reached by reason of the sickness or death of one of the jurors, the jury may take into consideration the expense of such trial in estimating the damages. Noyes *v.* Ward, 19 Conn. 250.

Exemplary damages may also be allowed in an action for assault and battery and false imprisonment. Wiley *v.* Keokuk, 6 Kans. 95. Wiley *v.* Manatowah, 6 Kans. 111. See Marsh *v.* Smith, 49 Ill. 396.

A failure to allege or prove special damage will not limit the recovery to nominal damages. Joselyn *v.* McAllister, 22 Mich. 300.

(*k*) Tullidge *v.* Wade, 3 Wils. 18.

assaulted and imprisoned under a false charge of felony, where no felony has been committed (*ante*, p. 700), or where there was no reasonable ground for suspecting and charging the plaintiff, exemplary damages will be recovered.

Circumstances of provocation and excuse may be given in evidence, in mitigation of damages, so long as they do not amount to a justification, and could not be pleaded as such(*l*). But if they constitute an answer to the action by way of justification for the assault, they must be pleaded, and cannot then be given in evidence in reduction or mitigation of the damages(*m*). Where, in an action for an assault, it was contended that the blow was unintentionally struck, the defendant intending to strike *A*, when he accidentally in the scuffle struck *B*, Bosanquet, J., told the jury that there could be no doubt but that, as the defendant struck the plaintiff, the plaintiff was entitled to a verdict, whether it was done intentionally or not, but that the intention was material in determining the amount of damages(*n*). If it be proved that the blow was unintentionally struck, and that an apology was immediately offered, the evidence would tend materially to reduce the amount of damages.

Where the plaintiff, in an action for an assault and false imprisonment, sought to make the defendant responsible for the consequences of a remand by the magistrate, it was held that he was liable only for the first imprisonment and taking before the magistrate, and not for the remand or any subsequent detention thereunder, they being the acts of the justice(*o*); but in an action for a malicious prosecution, the defendant will be liable for the injury resulting from a remand(*p*). Where a railway company removed a passenger from the train (without any unnecessary violence) under the mistaken impression that he had no ticket, and the passenger left a pair of race-glasses behind him, it was held he could not recover the value of them as part of the damages for the assault, although the court admitted it would have been otherwise had he lost any part of his property in a scuffle with the railway servants(*q*).

846 *Damages, where there are several co-trespassers.*—Where several persons have associated themselves together in the pursuit of a common

(*l*) *Post*, ch. 22, s. 1.
(*m*) Watson *v.* Christie, 2 B. & P. 224. Speck *v.* Phillips, 7 Dowl. 473. Lingford *v.* Lake, 3 H. & N. 276.
(*n*) James *v.* Campbell, 5 C. & P. 372.
(*o*) Lock *v.* Ashton, 12 Q. B. 876.
(*p*) *Post*, ch. 13.
(*q*) Glover *v.* Lond. & S.-Western Rail. Co., L. R., 3 Q. B. 25.

object, and they all trespass upon the plaintiff's land in following out the common design, each is answerable for the whole of the damage done by all(*r*). And whenever two persons have so conducted themselves as to be liable to be jointly sued, each is responsible for the injury sustained by their common act. The true criterion of damage in such cases is the whole injury which the plaintiff has sustained from the joint act of all. Where, therefore, two persons have a joint purpose, and thereby make themselves joint-trespassers, and the one beats violently, and the other a little, the real injury is the aggregate of the injury received from both, and each is responsible for all the damage; but the malignant motive of one party cannot be made a ground of aggravation of damage against the other, who was altogether free from any improper motive(*s*).

847 *Prospective damages.*—In all cases of serious assault, the jury should take into their consideration, in assessing the damages, the probable future injury that will result to the plaintiff from the act of violence perpetrated by the defendant, for the damages, when given, are taken to embrace all the injurious consequences of the wrongful act, unknown as well as known, which may arise hereafter, as well as those which have arisen, so that the right of action is satisfied by one recovery. Thus, where the plaintiff had received a blow on the head, and sustained little apparent injury, and recovered small damages, and afterwards, and in consequence of the blow, a portion of his skull came away, and it then appeared that the skull had been fractured, and he then brought a second action, which was attempted to be supported on the ground that the former recovery was for a mere battery, and this for maihem, it was held that no action lay, for there was but one blow, and that was the cause of action in both suits, and not the consequences. And the distinction was pointed out between this case and one of continuing nuisance, where each continuance was a fresh nuisance(*t*). No fresh action, therefore, arises by reason of subsequent new damage resulting from the wrongful act, if the act itself were actionable; for, if the action were brought, all the damages which he ever could recover for that injury could be recovered by the plaintiff in that action, if he succeeded(*u*).

848 *Special damages in actions for false imprisonment.*—Money paid by

(*r*) Hume *v.* Oldacre, *ante*, p. 385.

(*s*) Clark *v.* Newsam, 1 Exch. 140. That the jury may sever damages and apportion them in an action of trespass for assault and battery, against several defendants, see Bevin *v.* Linguard, 1 Brev. 503.

(*t*) Fetter *v.* Beal, 1 Ld. Raym. 339, 93.

(*u*) Coleridge, J., Bonomi *v.* Backhouse, 27 Law J., Q. B. 390.

the attorney of the plaintiff to procure the release of the plaintiff from an unlawful imprisonment, is recoverable as part of the damages naturally and directly resulting from the wrongful act, provided the plaintiff claims them in his declaration, "for a man may say that he has been forced to pay that which another, who is his agent, has been forced to pay for him"(*x*). The allegation that the plaintiff has been forced to pay, etc., is a material allegation, and proof of actual payment is necessary to support it. Every expense that the plaintiff necessarily incurs in order to restore himself to a complete state of freedom from imprisonment is recoverable as part of the damages, if the plaintiff has claimed them in his declaration. Where a plaintiff, by being bailed, obtained only an imperfect release, being in the hands and at the mercy of persons who might at any time render him back to gaol, it was held that the expense of removing himself from that position was only one of the steps necessary for completing his discharge from the original imprisonment, and that, if it were necessary for the plaintiff to set aside an inquisition in order to restore himself to a complete state of freedom, he was entitled to recover the expense thereof, as part of the damages of the original wrongful act(*y*).

849 *Evidence in mitigation of damages.*—In an action for false imprisonment in giving the plaintiff in charge to a police-officer, it may be shown, in mitigation of damages, that the plaintiff had for several days annoyed and insulted the defendant, by following him about the streets, and telling him to pay his debts(*z*). But all facts and circum-

(*x*) Pritchet *v.* Boevey, 1 Cr. & M. 778.

(*y*) Foxall *v.* Barnett, 2 Ell. & Bl. 298; 23 Law J., Q. B. 7.

(*z*) Thomas *v.* Powell, 7 C. & P. 807; and see *post*, ch. 22. It is well settled that no words of provocation will justify an assault, athough they may be a ground for the reduction of damages. Cushman *v.* Ryan, 1 Story, 91. Ireland *v.* Elliott, 5 Clarke (Iowa), 478.

But to entitle the defendant to give evidence of provocation in mitigation of damages, the provocation must be so recent as to raise the presumption that the assault was committed under the immediate influence of the feelings and passions thereby excited. Lee *v.* Woolsey, 19 Johns. 319. Jacaway *v.* Dula, 7 Yerg. 82. Fullerton *v.* Warrick, 3 Blackf. 219. Matthews *v.* Terry, 10 Conn. 455. Avery *v.* Ray, 1 Mass. 12. Guernsey *v.* Morse, 2 Root, 252. Ellsworth *v.* Thompson, 13 Wend. 658.

Thus evidence of the use of opprobrious language by the plaintiff to the female relatives of the defendant a day or two previous to the assault, is inadmissible in mitigation of damages. Collins *v.* Todd, 17 Mo. 537. See Barry *v.* Inglis, 1 Taylor, 121; Rochester *v.* Anderson, 1 Bibb, 428.

But while, as a general rule, a remote provocation cannot be given in evidence for the purpose of mitigating damages, yet, where the acts or words constituting the provocation were portion of a series of provocations frequently repeated and continued down to the time of the assault, they may be proven. Stetlar *v.* Nellis, 60 Barb. (N. Y.) 524. Dolan *v.* Fagan, 63 Barb. (N. Y.) 73.

The fact that the parties to an assault fought by consent may be considered in mitigation of damages. Adams *v.* Waggoner, 33 Ind. 531.

The bad character of the plaintiff cannot be given in evidence to mitigate the damages in an action for assault and battery. Corning *v.* Corning, 6 N. Y. 97.

stances amounting to a justification, or to a contradiction of a material fact admitted upon the record, must be specially pleaded, and cannot be given in evidence in mitigation of damages(*a*). In an action of assault, therefore, a defendant cannot, under a plea of not guilty, prove that he committed the assault in self defence, or in fear of his life; and a sheriff who has imprisoned the plaintiff cannot, if he pleads not guilty only, give evidence of his writ in mitigation of damages(*b*).

The recovery of damages in an action for false imprisonment is no bar to an action for a malicious prosecution(*c*).

(*a*) Linford *v.* Lake, 27 Law J., Exch. 334.
(*b*) Speck *v.* Phillips, 5 M. & W. 281.
(*c*) Guest *v.* Warren, 9 Exch. 379; 23 Law J., Exch. 121; *post*, ch. 22.

CHAPTER XIII.

OF MALICIOUS CONSPIRACY, MALICIOUS PROSECUTION, AND ARREST—MALICIOUS ABUSE OF LEGAL PROCESS.

SECTION I.—*Of malicious conspiracy, prosecution, and arrest—Malicious abuse of legal process.*—Malicious conspiracy—Malicious exhibition of articles of the peace—Malicious prosecution—What is evidence of want of reasonable and probable cause, and of malice—Prosecutions by persons conscious of the innocence of the accused—Prosecutions under the advice of counsel—Malicious complaints before magistrates, causing a warrant to be improperly issued—Ratification of pending proceedings—Causing search warrant to issue—Malicious indictment—Malicious prosecution by court-martial—Malicious assertion of a legal right—Malicious and unfounded actions—Malicious execution—Maliciously causing an extent to issue—Malicious proceedings in bankruptcy—Malicious abuse of legal process—Malicious detention of judgment-debtors—Malicious arrest—Proof of actual custody.

SECTION II.—*Of actions for malicious arrest and malicious prosecution.*—Parties to be made defendants—Pendency of a rule for a criminal information against the defendant—Declaration of the cause of action—Pleadings, defences and evidence—Damages recoverable.

SECTION I.

OF MALICIOUS CONSPIRACY, MALICIOUS PROSECUTION AND ARREST—MALICIOUS ABUSE OF LEGAL PROCESS.

850 *Malicious conspiracy.*—A conspiracy to do an unlawful act, and the doing of the act in pursuance of the conspiracy to the damage of the plaintiff, create a good cause of action against all the parties to the conspiracy. A criminal proceeding by way of indictment lies for the mere act of conspiring, but a civil action is not maintainable unless

the plaintiff has been aggrieved, or has sustained "actual legal damage" by some overt act done in pursuance of the conspiracy(*a*).

Where the plaintiff's declaration of his cause of action set forth that he exercised the profession of an actor, and was engaged to perform in the character of Hamlet, in Covent Garden Theatre, and that the defendants and others maliciously conspired together to prevent the plaintiff from so performing, and from exercising his profession in the theatre, and in pursuance of the conspiracy hired and procured divers persons to go to the theatre and hoot the plaintiff, and the persons so hired did in pursuance of the conspiracy go to the theatre and hoot the plaintiff, and interrupted his performance, and prevented him from exercising his profession, and thereby caused the plaintiff to lose his engagement and divers gains and emoluments, and to be brought into public scandal and disgrace, it was held that the declaration disclosed a good cause of action(*b*).

But a conspiracy to institute legal proceedings and to obtain a judgment by means of false testimony, and the giving of such testimony, and the procurement of the judgment, to the pecuniary loss of the plaintiff, cannot be made the ground of an action for damages so long as the judgment remains unreversed, whether the judgment be the judgment of one of our own courts of justice or the judgment of a foreign tribunal, if it appears that the plaintiff had an opportunity, if he had thought fit to avail himself of it, of appearing and controverting the false testimony, or if it can be shown that he did appear and was heard, and that the matter was decided against him(*c*).

Where the plaintiff's declaration of his cause of action set forth that he was possessed of premises on which he carried on the business of a skin-dresser, and that the defendant and another person unlawfully and maliciously conspired together to procure possession of a portion of the said premises, and set up thereon a secret still for distilling spirits; that in pursuance of such conspiracy they induced the plaintiff to let to them a portion of the premises, by representing that they wanted them for the purpose of carrying on the business of ink-manufacturers; and that having thereby got possession of that part of the premises, they set up thereon certain private stills, and illegally dis-

(*a*) Crompton, J., Castrique *v.* Behrens, 30 Law J., Q. B. 168. Kimball *v.* Harman & Burch, 34 Md. 407. Hutchins *v.* Hutchins, 7 Hill (N. Y.), 107. Herron *v.* Hughes, 25 Cal. 555. Eason *v.* Petway, 1 Dev. & Bat. 44. Tappan *v.* Powers, 2 Hall, 277. See Patten *v.* Gurney, 17 Mass. 186; Swan *v.* Saddlemire, 8 Wend 676.

(*b*) Gregory *v.* Duke of Brunswick, 6 M. & Gr. 205; *ante*, pp. 10, 11.

(*c*) Castrique *v.* Behrens, 30 Law J., Q. B. 163.

tilled spirits, and caused it to appear that the plaintiff had himself set up the stills, and was illegally distilling upon his premises, and that the plaintiff in consequence thereof was arrested, convicted, fined, and imprisoned, averring that the plaintiff was wholly ignorant of the stills being on his premises; it was held that the action was not maintainable, as it did not appear that the arrest, conviction, and imprisonment of the plaintiff were the direct result of the wrongful act of the defendant, or that the defendant should in anywise be made responsible for the illegal acts contemplated by him. The defendant's act of conspiring, it was observed, merely enabled him to obtain possession of part of the plaintiff's premises. The only ground of damage was the plaintiff's being illegally convicted. And if it could have been shown that the conspiracy was entered into for the purpose of procuring a conviction of the defendant for having possession of a secret still, or for unlawfully distilling, the only remedy would have been an action for a malicious prosecution; and to such an action the conviction of the defendant would be an answer, for it must be assumed that the facts relied upon by him were brought before the tribunal for his exculpation, and were decided against him(*d*).

If two confidential agents of a partnership conspire together to obtain for themselves the shares of the partners at an undervalue by keeping the accounts of the partnership fraudulently, so as to conceal from the partners the true value of their shares, they will be responsible both at common law and in equity for the damage resulting from their breach of duty(*e*).

851 *Malicious exhibition of articles of the peace against another*, supported by a false oath of threats having been used, may be made the foundation of an action for damages, notwithstanding that the accused person has been required to find sureties, and been imprisoned for default, for the truth of the articles cannot be controverted before the court, which has no discretion, and can pronounce no judgment on the truth of the facts, but is bound to act upon the statement sworn to before them(*f*). Where, therefore, the plaintiff's declaration of his cause of action set forth that the defendant falsely and maliciously, and without any reasonable or probable cause, made information on oath before a magistrate that the plaintiff had used certain

(*d*) Barber v. Lesiter, 7 C. B., N. S. 183.
(*e*) Walsham v. Stainton, 33 Law J., Ch. 68.
(*f*) Rex v. Doherty, 13 East, 171. Venafra v. Johnson, 3 M. & Sc. 847; 10 Bing. 301.

specified threatening language to him whereby the defendant went in fear of bodily harm, and then caused the plaintiff to be arrested and brought before justices of the peace, and required to find sureties, and to be imprisoned, it was held that the declaration disclosed a good cause of action, although it appeared that the proceeding terminated against the accused, it being founded upon a statement on oath, which the person charged was not at liberty to controvert(*g*).

852 *Malicious prosecution.*—To put the criminal law in force maliciously, and without any reasonable or probable cause, is wrongful; and if thereby another is prejudiced in property or person, there is that conjunction of injury and loss which is the foundation of an action(*h*). "Malice alone is not sufficient, because a person actuated by the plainest malice may nevertheless have a justifiable reason for the prosecution. On the other hand, the substantiating the accusation is not essential to exonerate the accuser from liability to an action, for he may have good reason to make the charge, and yet be compelled to abandon the prosecution by the death or absence of witnesses, or the difficulty of producing adequate legal proof. The law, therefore, only renders him responsible where malice is combined with want of probable cause"(*i*). But though abandoning a prosecution be not of itself proof of want of probable cause, yet where the prosecution is persisted in and kept hanging over the head of the plaintiff for a long time, and is then dropped at the very hour of trial, there is strong ground for supposing that the prosecutor had no justifiable reason for commencing it(*k*).

853 *What is evidence of a want of reasonable and probable cause, and of malice.*—The want of reasonable and probable cause for a malicious

(*g*) Steward *v.* Gromett, 7 C. B., N. S. 191; 29 Law J., C. P. 170.

(*h*) Churchill *v.* Siggers, 3 Ell. & Bl. 937. An action for malicious prosecution lies (1.) When a person knowing that a certain act does not constitute a crime procures the indictment of another for such act as a crime; and (2.) Where a person believing that such an act would constitute a crime, falsely and maliciously accuses the other of such act, and procures his indictment. Dennis *v.* Ryan, 5 Lans. (N. Y.) 350.

(*i*) Tindal, C.J., Willans *v.* Taylor, 6 Bing. 186; 3 M. & P. 350; 2 B. & Ad. 845. Deitz *v.* Langfelt, 63 Pa. St. 234. Shafer *v.* Loucks, 58 Barb. 426. Preston *v.* Cooper, 1 Dill. 589. Fullenwider *v.* McWilliams, 7 Bush (Ky.), 389. Burnaps *v.* Albert, Taney, 244. Dickinson *v.* Maynard, 20 La. An. 66. Casperson *v.* Sproule, 39 Mo. 39. Callahan *v.* Caffarata, 39 Mo. 136. Cook *v.* Walker, 30 Ga. 519. Malone *v.* Murphy, 2 Kansas, 250. Ritchey *v.* Davis, 11 Iowa, 124. Wade *v.* Walden, 23 Ill. 425. Israel *v.* Brooks, 23 Ill. 575. Bessen *v.* Southard, 10 N. Y. 236. Greenwade *v.* Mills, 31 Mo. 464. McBean *v.* Ritchie, 18 Ill. 114. Hitson *v.* Forest, 12 Texas, 320. McNerse *v.* Herring, 8 Texas, 151. Long *v.* Rodgers, 19 Ala. 821. Wiggin *v.* Coffin, 3 Story, 1. Kelton *v.* Bevins, Cooke, 90. Murray *v.* Long, 1 Wend. 140. Cambell *v.* Threlkeld, 2 Dana, 425. Turner *v.* Walker, 3 Gill & Johns. 377. Pangburn *v.* Bull, 1 Wend. 345. M'Cormick *v.* Sisson, 7 Cow. 715. Stone *v.* Stevens, 12 Conn. 219. Blunt *v.* Little, 3 Mason, 102. McKown *v.* Hunter, 30 N. Y. 625. Murphy *v.* Redler, 16 La. An. 1. Robertson *v.* Spring, 16 La. An. 252.

(*k*) Gaselee, J., 6 Bing. 190. Brown *v.* Randall, 36 Conn. 56.

prosecution, and the evidence of malice, depend so much upon the particular circumstances of the individual case as to render it impossible to lay down any general rule upon the subject, but the facts ought to satisfy any reasonable mind that the accuser had no ground for the proceeding but his desire to injure the accused(*l*). If circumstances of suspicion existed which might have been readily removed by proper inquiry, and no inquiry at all was made(*m*), there is evidence of a want of reasonable and probable cause, and if in the opinion of the judge there was no reasonable or probable cause for the prosecution, the jury may, from that fact alone, infer malice(*n*). If a person prefers an indictment, or sets the criminal law in motion, knowing at the time he does so that he has no reasonable ground for it, that alone is evidence of malice on his part. "By the term 'malice' is meant any indirect motive of wrong. Any motive other than that of simply instituting a prosecution for the purpose of bringing a person to justice, is a malicious motive on the part of the person who acts under the influence of it. If a case is trumped up out of very weak and flimsy materials, for purposes of annoyance or of frightening other people, and deterring them from committing depredations upon private property, there is no legitimate foundation for a criminal prosecution, and persons who put the criminal law in motion under such circumstances lay themselves open to a charge of being influenced by malice"(*o*).

From the most express malice, the want of probable cause cannot be implied(*oo*). A man from a malicious motive may take up a prosecu-

(*l*) Tindal, C.J., 6 Bing. 186; 2 B. & Ad. 845. Farmer *v.* Darling, 4 Burr. 1972.

(*m*) Perryman *v.* Lister, *ante*, p. 729. See Long *v.* Rodgers, 19 Ala. 321; Wiggin *v.* Coffin, 3 Story, 1.

(*n*) Busst *v.* Gibbons, 30 Law J., Exch. 75. Malice is a question of fact for the jury. Newell *v.* Downs, 8 Blackf. 523. Potter *v.* Seale, 8 Cal. 217. Von Latham *v.* Libby, 38 Barb. 339. Ritchey *v.* Davis, 11 Iowa, 124. Cloon *v.* Gerry, 12 Gray (Mass.), 201. Besson *v.* Southard, 10 N. Y. 236. Which may be inferred by them from want of probable cause in instituting a prosecution. Newell *v.* Downs, 8 Blackf. 523. Casperson *v.* Sproule, 39 Mo. 39. Callahan *v.* Caffarata, 39 Mo. 136. Ammerman *v.* Crosby, 26 Ind. 451. Closson *v.* Staples, 42 Vt. 209. Levi *v.* Brannan, 39 Cal. 485. Merriam *v.* Mitchell, 1 Shep. 439. Hall *v.* Hawkins, 5 Humph. 357. Wood *v.* Wier, 5 B. Mon. 544. Brooks *v.* Jones, 11 Ired. 260. Straus *v.* Young, 36 Md. 246.

Or may not, as the want of probable cause does not raise a legal presumption of malice. Ammerman *v.* Crosby, 26 Ind. 451. Levi *v.* Brannan, 39 Cal. 485. Malone *v.* Murphy, 2 Kansas, 250. Ritchey *v.* Davis, 11 Iowa, 124. Bell *v.* Pearcy, 5 Ired. 83. Hall *v.* Hawkins, 5 Humph. 357. Vanderbilt *v.* Mathis, 5 Duer. 304. But see Blass *v.* Gregor, 15 La. An. 421; Griffin *v.* Chubb, 7 Texas, 603.

Malice may also be inferred from the defendant's zeal and activity in conducting the prosecution against the plaintiff in the original suit. Straus *v.* Young, 36 Md. 246. But not from the mere fact that the defendant employed an attorney to conduct the prosecution. Aldridge *v.* Churchill, 28 Ind. 62.

(*o*) Stevens *v.* Mid. Rail. Co., 10 Exch. 356; 23 Law J., Exch. 328.

(*oo*) Horn *v.* Boon, 3 Strobh. 307. Hall *v.* Suydam, 6 Barb. 83. Mitchinson *v.* Cross, 58 Ill. 366. Griffin *v.* Chubb, 7 Texas, 603. Casperson *v.* Sproule, 39 Mo. 39. Callahan *v.* Caffarata, 39 Mo. 136. Murray *v.* Long, 1 Wend. 140. Besson *v.* Southard, 10 N. Y. 236.

tion for real guilt, or he may from circumstances which he really believes, proceed upon apparent guilt, and in neither case is he liable to an action(*p*). With whatever feelings of malice the defendant may have acted in instituting the prosecution, still, if there was reasonable and probable cause for it in the opinion of the judge, the defendant is entitled to a verdict(*pp*).

854 *Prosecution by persons who manifest a consciousness of the innocence of the accused.*—Proof of the absence of belief in the truth of the charge by the person making it and putting the criminal law in motion, is almost always involved in the proof of malice. Where the plaintiff complained of a prosecution for perjury, which the defendant had instituted against him for the purpose, as the plaintiff alleged, of suppressing evidence, and it was proved that the defendant, on being told that there was not sufficient ground for the indictment, declared that it was no matter, and that it would tie up the mouth of the plaintiff in a proceeding in which he would be likely to give evidence against the defendant, it was held that the judge was right in asking the jury whether the prosecutor believed at the time he preferred the indictment that the defendant had really been guilty of perjury, and whether he instituted the prosecution *bonâ fide* under such a belief or from an improper motive, and in telling them, that if the defendant had acted from an improper motive they might infer malice(*q*).

If a person has been assaulted with a consciousness that, by his own

(*p*) Plummer *v.* Green, 8 Hawks, 66.

(*pp*) Patteson, J., Turner *v.* Ambler. 10 Q. B. 257. Halles *v.* Marks, 7 H. & N. 56. It is no defence to an action for malicious prosecution that the defendant honestly believed the plaintiff guilty of a crime when he commenced the prosecution. No man's liberties or rights are to be measured by even the honest belief of another. If the prosecutor, at the time of commencing a criminal prosecution, had an honest belief in the guilt of the accused, this will be an essential fact for him in showing probable cause, or in disproving the want of it; but he must also show such reasonable ground for suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in that belief, before it can become a perfect defence. Shaul *v.* Brown, 28 Iowa, 37. Merriam *v.* Mitchell, 1 Shep. 439. See *ante*, p. 728, note *d*.

If the defendant, in an action for malicious prosecution, should show such ground and circumstances, and yet it was apparent that he did not himself believe in the guilt of the accused at the time of commencing the prosecution, they will not protect him.' Bell *v.* Pearcy, 5 Ired. 83.

So, on the other hand, if the defendant believed in the guilt of the accused, and there were facts unknown to him which would, if known, negative or destroy that belief, the defendant will not be liable if such facts were *beyond the range of inquiry of a cautious man*. The belief, therefore, of the defendant, is a proper matter for inquiry in establishing a defence, but does not of itself constitute a defence. Winnebiddle *v.* Porterfield, 9 Barr. 137. Lawrence *v.* Lanning, 4 Ind. 196. Jacks *v.* Stimpson, 13 Ill. 701. Willes *v.* Noyes, 12 Pick. 324. Wood *v.* Wier, 5 B. Mon. 544. Hall *v.* Hawkins, 5 Humph. 357. Shaul *v.* Brown, 28 Iowa, 37. But see Collard *v.* Gay, 1 Texas, 494; Chandler *v.* McPherson, 11 Ala. 916.

This belief may be shown by the testimony of the defendant. McKown *v.* Hunter, 30 N. Y. 625.

(*q*) Hadrick *v.* Heslop, 12 Q. B. 267. Broad *v.* Ham, 8 Sc. 59; 5 B. N. C. 722.

misconduct, he provoked the assault, and has no reasonable ground to complain of it, and he nevertheless prefers an indictment, upon which the plaintiff is tried and acquitted, it is for a jury to say whether the defendant instituted the prosecution with a consciousness that he was wrong; and, if they think so, there is a total absence of reasonable and probable cause for it, and evidence from which malice may fairly be inferred(*r*). If the defendant appears to have put the criminal law in motion for the purpose of enforcing payment of a debt, or obtaining the restitution of goods lawfully detained, without having any reasonable ground for prefering a criminal charge, there is evidence of malice, and of want of reasonable and probable cause for the prosecution(*s*).

If a man's own declarations and conduct, or the surrounding circumstances of the case, show that an act, which was made the foundation for a charge of felony, was not believed by the prosecutor himself to be a felony, there is no reasonable or probable cause for a charge of felony. If the circumstances show that the prosecutor believed that a person he proceeded against as a thief took the goods under an erroneous notion that he had a lien upon them, or had a right to take and detain them, there is evidence of malice, and of want of reasonable and probable cause for the prosecution for a felony(*t*). In an action for a malicious prosecution of the plaintiff by the defendant for obtaining goods from the defendant by false pretences, it appeared that the plaintiff, who had been insolvent, went to the shop of the defendant in his absence, and obtained five shillings' worth of marble hall-paper from his assistant, saying that it was for Mr. Hills, a neighbor, and that the bill was to be made out to Mr. Hills, which was done, and the bill was delivered to the plaintiff, who took it and the paper away with him; but Mr. Hills had not authorized the plaintiff to get the paper, and would not pay for it, and the defendant was told this a few hours after the paper had been obtained, and knew who the plaintiff was, and where he resided, but made no complaint against him for three months; and being asked the reason, said that the transaction had slipped his memory until he was going through his books, when, seeing the entry of the paper against Mr. Hills, he went to him, and finding that he still repudiated the transaction, and refused to pay for the paper, he went before a magistrate, and charged the plaiutiff with

(*r*) Hinton *v.* Heather, 14 M. & W. 131.

(*s*) Brooks *v.* Warwick, 2 Stark. 393. M'Donald *v.* Rooke, 2 B. N. C. 219. Scofield *v.* Ferrers, 47 Penn. St. 194.

(*t*) Huntley *v.* Simson, 2 H. & N. 600; 27 Law J., Exch. 134. Bauer *v.* Clay, 8 Kan. 580.

having obtained the paper by false pretences. Upon these facts Wightman, J., asked the jury, first, whether they thought the plaintiff obtained the paper by falsely pretending that it was for Mr. Hills; and this question being answered in the affirmative, they were then asked whether they thought that the defendant, at the time he went before the magistrate, believed that the plaintiff intended to defraud him of the price of the paper; and, this question being answered in the negative, Wightman, J., held that there was no reasonable and probable cause for the prosecution(*u*).

Any statements or declarations made by the defendant tending to show that he was actuated by spite and ill-will in instituting the prosecution are of course evidence of malice(*x*). "When a person says to the prosecutor of an indictment for perjury that there really is no case against the man he has indicted, and the prosecutor answers, 'I indict him to stop his mouth,' there is reasonable evidence from which a jury may infer that the prosecutor knows that the man is not guilty, but only indicts him for the purpose he has mentioned"(*y*).

The fact that overseers of the poor have taken out a summons before justices, and have caused a warrant of distress and a warrant of arrest to issue against the plaintiff for the non-payment of poor-rates, they knowing at the time that the plaintiff was bankrupt, and had obtained his protection, is no evidence of malice to support an action for a malicious prosecution against the overseers(*z*).

855 *Prosecutions under the advice of counsel.*—It is no answer to an action for a malicious prosecution to show that the defendant was bound over by recognizance to prosecute and give evidence, if it appears that the prosecution originated in malice, and that the recognizance was the result of prior malicious proceedings, instigated by the defendant(*a*). Counsel's opinion is of no avail to a man who has instituted an unfounded and malicious prosecution. "It would be a most pernicious practice," observes Heath, J., "if we were to introduce the principle that a man, by obtaining the opinion of a counsel, by applying to a weak man or an ignorant man, may shelter his malice in bringing an unfounded prosecution"(*b*).

(*u*) Williams *v.* Banks, 1 F. & F. 557.

(*x*) Michell *v.* Williams, 11 M. & W. 217. Chapman *v.* Dodd, 10 Minn. 350. Turner *v.* Walker, 3 Gill & Johns. 377.

(*y*) Maule, J., Heslop *v.* Chapman, 23 Law J., Q. B. 49.

(*z*) Phillips *v.* Naylor, 4 H. & N. 565; 27 Law J., Exch. 222.

(*a*) Dubois *v.* Keats, 11 Ad. & E. 332. Fitz John *v.* Mackinder, 30 Law J., C. P. 257.

(*b*) Hewlett *v.* Cruchley, 5 Taunt. 283. In an action for malicious prosecution it is not competent, for the purpose of rebutting malice and to show probable cause, to prove that the

"A prosecution," observes Cockburn, C.J., "though in the outset not malicious, may nevertheless become malicious in any of the stages through which it has to pass, if the prosecutor, having acquired positive knowledge of the innocence of the accused, perseveres *malo animo* in the prosecution, with the intention of procuring *per nefas* a conviction"(*c*).

In an action for a malicious prosecution it appeared that the defendant had sued the plaintiff in the county court, who pleaded a set-off, and the defendant, in order to get rid of the set-off, forged a receipt of the plaintiff for a sum of money, and swore before the county court judge that the handwriting to that receipt was the handwriting of the plaintiff. The plaintiff denied it, and the county court judge, believing the plaintiff to have been guilty of perjury, committed him for trial, and bound over the defendant to prosecute. The defendant proceeded to the assizes, went before the grand jury and procured a bill of indictment to be found against the plaintiff, and stuck to the charge at the trial, and endeavored to maintain it by perjured evidence, but

defendant acted under the advice of a magistrate or other person not learned in the law. Strauss *v.* Young, 36 Md. 246. Olmstead *v.* Partridge, 82 Mass. 381. But see Sisk *v.* Hurst, 1 W. Va. 53.

But it is competent for the defendant to show, for that purpose, that he acted upon the advice of counsel, to whom he stated the facts as he understood them. Eastman *v.* Keasor, 44 N. H. 518. Collins *v.* Hayte, 50 Ill. 337. But see Collard *v.* Gay, 1 Texas, 494. And if it appears that the prosecution was commenced in good faith, under the advice of counsel given in good faith, after a full and fair statement of the case, this will be a good defence to the action. Ames *v.* Rathbun, 55 Barb. (N. Y.) 194. Phillips *v.* Bonham, 16 La. An. 387. Leaird *v.* Davis, 17 Ala. 27. See Cole *v.* Curtis, 16 Minn. 182. But to have this effect it must be shown in evidence that the defendant stated to his counsel all the facts bearing on the guilt or innocence of the accused which he knew, or could by reasonable diligence have discovered. Ross *v.* Innis, 35 Ill. 487. Stevens *v.* Fassett, 27 Me. 266. Sappington *v.* Watson, 50 Mo. 83. Cooper *v.* Utterbach, 37 Md. 282. Hill *v.* Palm, 38 Mo. 13. Ash *v.* Marlow, 20 Ohio, 119. It must appear that the opinion of the counsel was honestly sought and understandingly given. Kendrick *v.* Gypert, 10 Humph. 291. And for the purpose of testing the good faith of the defendant as to the disclosure to the counsel, it is proper to ask the counsel what were the facts on which his advice was based. Cooper *v.* Utterbach, 37 Md. 282. And if it appears that the defendant withheld material facts which he knew or ought to have known, or that he received from other counsel, learned in the law, whose counsel he sought, advice of a char acter contrary to that on which he acted, the advice of counsel in favor of the prosecution will not avail as a defence. Stevens *v.* Fassett, 27 Me. 266.

(*c*) Fitz John *v.* Mackinder, 30 Law J., C. P. 264. Thus, a party may make a full and correct statement of his case to his counsel and receive his advice thereon, and act under and in pursuance of it, and yet not prosecute his action in good faith; for after receiving the advice he may become informed of facts which satisfy him that the accused is not guilty. Good faith in acting under the advice of counsel is essential to a defence. Cole *v.* Curtis, 16 Minn. 182.

If it appears from the evidence that the defendant in the action for malicious prosecution acted from motives of private interest and without probable cause to support the prosecution, the advice of counsel will not exempt him from liability. Glascock *v.* Bridges, 15 La. An. 672.

Professional advice is only evidence to rebut the imputation of malice; and where malice is expressly proved, advice of counsel will not palliate it. Davenport *v.* Lynch, 6 Jones' Law (N. C.), 545. Stevens *v.* Fassett, 27 Me. 266.

the plaintiff was acquitted. The plaintiff then brought an action against the defendant for a malicious prosecution, and having satisfied a jury that the defendant preferred the charge with the knowledge of its falsehood, recovered 200*l.*; and it was held that the action was maintainable, because the defendant persisted to the last in the false charge, having no reasonable or probable cause for the charge, but preferring it with knowledge of its falsehood, and endeavoring at the trial to maintain it with further and perjured evidence(*d*). "But for the order of the county court judge," observes Willes, J., "the action would, beyond all doubt, have been maintainable, and then that order ought not to aid the defendant; first, because it was occasioned by his own contrivance and wrong; and, secondly, because as a judicial act it is void, having been obtained by fraud on the court"(*e*). Although the defendant was compelled to prosecute, there was no compulsion upon him to persist in a false charge. He might have discharged his recognizances by appearing and telling the truth. "It is supposed," observes Lord Denman, "that a charge cannot be preferred before a grand jury maliciously, if the party be bound to prefer it, though the recognizance be obtained in consequence of his malicious proceeding. I have not the smallest doubt that a recognizance so obtained does not justify a party, or prevent his subsequent conduct from being malicious." "If an unwilling party," further observes Littledale, J., "were bound over by recognizance to prosecute, the recognizance would furnish an answer for this reason only, that in such a case the plaintiff could not prove that the defendant was actuated by a malicious motive"(*f*).

856 *Malicious complaints before magistrates—Maliciously causing a justice's warrant to be issued against the plaintiff.*—If a defendant maliciously and without reasonable and probable cause has attended before a magistrate and made a complaint, and induced the magistrate to issue a warrant against the plaintiff, the defendant is responsible in damages in an action for a malicious prosecution. If he goes before a magistrate and states that he has just cause to suspect that the plaintiff has robbed him, and upon that representation a warrant is granted, it does not lie in his mouth to say that the magistrate ought not to have granted the warrant; and if he has knowingly made a false charge, and had no real *bonâ fide* ground of suspicion, he is answerable for

(*d*) Fitz John *v.* Mackinder, 30 Law J., C. P. 257.
(*e*) 29 Law J., C. P. 170.
(*f*) Dubois *v.* Keats, 11 Ad. & E. 332.

it(*g*). But to show that the defendant was influenced by malice, it must be proved that the charge was wilfully false, or that the statements made by him before the magistrate were untrue to his knowledge, at the time he made them(*h*), or that they were of such a nature that no well-intentioned person would state them, and found a criminal charge upon them, without ascertaining whether they were true or false, the means of inquiry and of ascertaining the truth being within his reach, if he had thought fit to avail himself of them. "A man may prefer a charge either on the foundation of what he knows or of what he suspects. But there is a wide difference, as regards both the accuser and the party accused, whether the charge be made on the one ground or the other. That which is founded on the accuser's own knowledge will require proof to that extent to warrant such a charge; whereas that which rests on suspicion only will be satisfied by circumstances sufficient to induce suspicion on the mind of a cautious person." "This distinction," observes Bayley, J., "between a direct charge and one upon suspicion only is well known. I may know that a person has stolen my property by having seen him commit the act, or by having heard him confess it, and in either of these cases the charge would proceed directly from my own knowledge, but information to a less extent might reasonably create in me a suspicion, and then the charge would proceed in a form less direct"(*i*).

It has been held, that if a person goes and lays his complaint of the loss of his property before a magistrate, and tells him of its having been taken or appropriated by the plaintiff, the complaining party is not responsible for what the magistrate may think fit to do upon the strength of this information. If, therefore, the magistrate, acting upon the statement or deposition *bonâ fide* given, treats the matter as a felony, and issues his warrant for the apprehension of the plaintiff on the charge of felony, and in so doing forms an erroneous judgment, and conceives that to be a felony which is not a felony, but only matter for a civil action, the complaining person, who has thus set the magistrate in motion and caused the warrant to be issued, is not responsible for the erroneous judgment of the magistrate, and the acts consequent thereupon(*k*). But if there is no reasonable or probable

(*g*) Elsee *v.* Smith, 1 D. & R. 105.
(*h*) Cohen *v.* Morgan, 6 D. & R. 8.
(*i*) Davis *v.* Noake, 6 M. & S. 32.
(*k*) Leigh *v.* Webb, 3 Esp. 165. Wyatt *v.* White, 5 H. & N. 371; 29 Law J., Exch. 198; *ante*, pp. 718-720. See Sisk *v.* Hurst, 1 W. Va. 53; M'Neely *v.* Driskell, 2 Blackf. 259. Bodwell *v.* Osgood, 3 Pick. 379, 393; Heyward *v.* Cuthbert, M'Cord, 354; Von Latham *v.* Libby, 38 Barb. 339; Brown *v.* Chadsey, 39 Barb. 253.

cause for a charge of felony, and a charge of felony is made, the party preferring the charge will be responsible for it, though he acted under the advice of the magistrate, and preferred the charge at his suggestion.

It is often a doubtful question whether a particular offence amounts to a felony, and it often depends upon the fact of the prisoner's having acted with conscious dishonesty, or under a notion of right on his part. But "some persons suppose that no man can lay his hands on goods that do not belong to him without being guilty of felony. If you could get at the bottom of a man's mind, he might say he was justified, because the plaintiff had no right to do it, no matter how honest his intention; but if that is his opinion, it is a blunder on his part, and one of those blunders," observes Bramwell, B., "for which a man who commits it should be punished, as it is very likely that the person charged with felony through the blunder will, as long as he lives, be sometimes asked, whether he had not been had up before the magistrate for felony"(*l*).

It is not necessary, in order to maintain an action against a person for having made a false and unfounded charge of felony against another before a magistrate, to show that the charge was taken down in writing, and acted upon by the magistrate. But it is necessary that the jury should be satisfied that it was made to the magistrate with a view of inducing him to entertain it as a charge of felony(*m*).

857 *Continuance by defendant of proceedings commenced without his knowledge.*—When the proceedings have not been commenced by the defendant, but have only been continued by him, his responsibility commences at the point at which he becomes cognizant of the proceedings. And there is a material distinction between instituting a prosecution and merely attending the hearing upon a proceeding already commenced. It does not at all follow that the defendant, by attending the hearing, adopts the proceeding, or renders himself responsible for the motives or actions of the person who instituted it, although that person may be an agent of the defendant(*n*).

858 *Effect of the complaint or information before the magistrate being followed up by a conviction of the plaintiff.*—A conviction of the plaintiff by a magistrate, so long as it has not been reversed on appeal, affords a conclusive answer to the charge that the complaint or infor-

(*l*) Huntley *v.* Simson, 27 Law J., Exch. 137; 2 H. & N. 600. See Humphries *v.* Parker, 52 Me. 502; Dennis *v.* Ryan, 63 Barb. (N. Y.) 145.
(*m*) Clarke *v.* Postan, 6 C. & P. 423.
(*n*) Weston *v.* Beeman, 27 Law J., Exch. 57.

mation which led to it was founded in malice, and was preferred without reasonable or probable cause(*o*).

859 *Maliciously causing a search warrant to issue.*—If a person, without reasonable and probable cause, and from malicious or corrupt motives, causes a search warrant to issue, he is liable to an action for damages at the suit of the party who has been damnified by the execution of the warrant; but if a person goes before a magistrate, and lays before him fair grounds of suspicion for the magistrate to exercise his judgment upon, and the magistrate thinks fit, in the exercise of the functions of his office, to issue the warrant, the person so attending before the magistrate is not then responsible for the issue of the warrant, unless he has knowingly or recklessly, and without due inquiry, sworn to what was false(*p*).

860 *Malicious indictment.*—If an indictment preferred by the defendant contains several charges against the plaintiff, and he is convicted on some and acquitted on others, this does not prevent the plaintiff from maintaining an action for a malicious prosecution in respect of the charges of which he was acquitted(*q*). The question whether there was or was not probable cause for some parts of the charge would affect the amount of the damages recoverable, but not the plaintiff's right to a verdict(*r*).

861 *Malicious prosecution by court-martial.*—An action for a malicious prosecution will not lie at the suit of a subordinate officer against his commanding officer for maliciously, and without reasonable or probable cause, bringing him to a court-martial, as it is an act done in the course of discipline, and under the powers legally incident to his situation in the public service(*s*). Nor can an action be brought by a private soldier against his commanding officer for a malicious discharge(*t*).

862 *Malicious assertion of a legal right.*—The malicious assertion of a legal right is not actionable. "Let a prosecution be never so maliciously carried on, yet if there be probable cause or ground for it, no action for a malicious prosecution will lie"(*u*). No man can be sued

(*o*) Mellor *v.* Baddeley, 2 Cr. & M. 678; *post*, ch. 15, and p. 761. Rosenstein *v.* Brown, 7 Phil. (Pa.) 144. See Palmer *v.* Avery, 41 Barb. 290; Whitney *v.* Peckham, 15 Mass. 243.

(*p*) Cooper *v.* Booth, 3 Esp. 144; cited 1 T. R. 535. Philips *v.* Naylor, 4 H. & N. 565; 27 Law J., Exch. 223; 28 Law J., Exch. 225. Wyatt *v.* White, *supra*. See Miller *v.* Brown, 3 Mo. 127.

(*q*) Reed *v.* Taylor, 4 Taunt. 617.

(*r*) Delisser *v.* Towne, 1 Q. B. 343. Ellis *v.* Abrahams, 8 Q. B. 713.

(*s*) Johnstone *v.* Sutton, 1 T. R. 548. Sutton *v.* Johnstone, 1 Bro. P. C. 76. Floyd *v.* Barker, 12 Rep. 23. Dawkins *v.* Lord Rokeby, *ante*, p. 730.

(*t*) Freer *v.* Marshall, 4 F. & F. 485. See ibid. 486, *in note*. See *ante*, p. 730.

(*u*) Anon. 6 Mod. 73.

for the exercise of his legal right to issue execution upon a judgment, though it be averred that he acted maliciously, and without reasonable and probable cause(*v*).

863 *Malicious and unfounded actions.*—If one man prosecutes a civil action against another maliciously, and without reasonable and probable cause, an action for damages is not maintainable against the prosecutor of the action. Thus, if one man slanders another in an action in a proper court no action will lie for it(*w*). There is a great difference between the bringing of an action and indicting maliciously and without cause. When a man brings an action he claims a right to himself, or complains of an injury done to him; and if a man fancies he has a cause of action he may sue and put forward his claim, however false and unfounded it may be. The common law, in order to hinder malicious, and frivolous and vexatious suits, provided that every plaintiff should find pledges, which were amerced if the claim was false. But that method became disused, and then to supply it the statutes gave costs to the successful defendants. But there was no amercement upon indictments, and the party had not any remedy to reimburse himself but by action. But if *A* sues an action against *B* for mere vexation, in some cases, upon particular damage, *B* may have an action, but it is not enough to say that *A* sued him *falso et malitiose*, but he must show the matter of the grievance specially, so that it may appear to the court to be manifestly vexatious(*x*).

864 *Maliciously putting the process of the law in motion in the name of a pauper or insolvent.*—No action will lie for improperly promoting a

(*v*) Roret *v.* Lewis, 5 D. & L. 373. Magnay *v.* Burt, 5 Q. B. 394.

(*w*) Beauchamp *v.* Croft, Keilw. 26.

(*x*) Savile *v.* Roberts, 1 Ld. Raym. 374; 1 Salk. 13. See Thomas *v.* Rouse, 2 Brevard, 75. In Clossen *v.* Staples (42 Vt. 209) the court held that the principle of the common law, recognized by the English courts before the statutes allowing costs to defendants, and which gave a remedy for injuries sustained which were malicious and without probable cause, is and ought to be still operative, and affords a remedy in all such cases where the taxation of costs is not an adequate compensation for the damage sustained; that the system of taxing costs under the statute, except in a very few cases, was enacted with reference to suits brought and prosecuted in good faith, and were not intended or supposed to be an adequate compensation for all damages which a successful defendant might sustain and should recover by reason of defending a suit which was brought and prosecuted maliciously and without probable cause; that when a civil suit is so commenced and prosecuted, and is terminated in favor of the defendant, the plaintiff in such suit is liable to the defendant in an action on the case for the damages sustained by him in the defence of that original suit in excess of the taxable costs obtained by him; and that to maintain an action to recover such damages, it is not material whether the malicious suit was commenced by process of attachment or by summons only. And see Whipple *v.* Fuller, 11 Conn. 581; Vanduzer *v.* Linderman, 10 Johns. 106; Pangburn *v.* Bull, 1 Wend. 345.

But it has also been held that an action for malicious prosecution cannot be maintained on account of the ordinary costs and expenses of a defence in a civil suit where there has been no arrest or special grievance. Potts *v.* Imlay, 1 South. 330.

civil action in the name of a third person, unless it be alleged and proved to have been done maliciously, and without reasonable or probable cause(*y*); but if there be malice and want of reasonable or probable cause the action will lie, provided there be also legal damage(*z*). If the plaintiff in an action charges the defendant with having maliciously, and without any reasonable or probable cause, commenced and prosecuted an action against him in the name of a third person for his (the defendant's) own benefit, whereby the plaintiff has sustained damage, and it appears that the party so wrongfully put forward by the defendant was a person in solvent circumstances, the action will be defeated, inasmuch as the award of costs upon the failure of that action would, in contemplation of law, have been a full compensation for the unjust vexation caused by the bringing of the action, and no damage would be deemed to have been sustained; but if it appears that in the previous action there was judgment of non-suit, with an award of costs, and that the plaintiff was a pauper, or an insolvent, and could pay no costs, and that the defendant knew of the insolvency of the plaintiff at the time he induced the latter to bring the action, and had himself no interest in the subject-matter of the suit, there would appear to be a good ground of action(*a*).

865 *Maliciously issuing execution for a larger sum than is due upon a judgment.*—Process of execution on a judgment for the purpose of obtaining the sum recorded is *primâ facie* lawful, and the judgment creditor cannot be rendered responsible in damages for issuing execution for more than is due upon the judgment, unless some actual damage can be shown to have been sustained by the plaintiff therefrom. It is not enough for the plaintiff to show that he was arrested and kept in custody for a greater amount than was due upon the judgment(*b*). He must also prove that, by reason of the arrest and detention for the larger sum, his imprisonment was prolonged, or the expense of obtaining his discharge increased. His remedy, where the thing has been done inadvertently, without malice, is to apply to the court, or a judge, that he may be discharged, and that satisfaction may be entered up, on payment of the balance justly due. "But it would not be creditable to our jurisprudence," observes Lord Campbell, "if

(*y*) Flight *v.* Leman, 4 Q. B. 883.

(*z*) Williams, J., in Cotterell *v.* Jones, 11 C. B. 730; 1 Roll. Abr. ACTION SUR CASE, H. pl. 1, p. 101.

(*a*) Cotterell *v.* Jones, 11 C. B. 728, 730; 21 Law J., C. P. 3. Atwood *v.* Monger, Styles, 378. Waterer *v.* Freeman, Hob. 266. Savile *v.* Roberts, 1 Ld. Raym. 378; 12 Mod. 208. Pechell *v.* Watson, 8 M. & W. 691.

(*b*) See Gerard *v.* Lewis, L. R., 2 C. P. 305.

the debtor had no remedy by action where his person or his goods have been taken in execution for a larger sum than remained due upon the judgment, the judgment creditor knowing the sum for which execution is sued out to be excessive, and his motive being to oppress or injure his debtor. The court or judge to whom summary application is made for the debtor's liberation can give no redress beyond putting an end to the process of execution on payment of the sum due, although by the excess the debtor may have suffered a long imprisonment, and have been utterly ruined in his circumstances"(*c*). An action, therefore, is maintainable against a judgment creditor for maliciously and without reasonable or probable cause indorsing a writ of *ca. sa.*, issued on such judgment to levy a larger sum than was due, and causing the debtor to be arrested thereunder, and it is not necessary for the plaintiff before bringing the action to obtain his discharge from custody by order of the court or a judge(*d*). But where *before* judgment the plaintiff paid part of the debt for which he was sued, and subsequently judgment was signed and a *ca. sa.* issued for the whole amount, it was held that no action lay, so long as the judgment stood for the full amount(*e*).

866 *Maliciously causing an extent to issue.*—If a defendant, from feelings of ill-will, and with a view to annoy and injure the plaintiff, prays an extent to secure a debt due from the plaintiff to the crown, under the pretence that the debt is in danger of being lost to the crown, when he knows it not to be in danger, or has no reasonable or probable cause for believing it to be in danger, he will be responsible in damages in an action for a malicious prosecution. Such a proceeding is calculated to affect the plaintiff's credit, and bring demands upon him, and be productive of injurious and even ruinous consequences to him. In the action for the malicious prosecution, the law requires that the writ of extent should be traced to its close, and that may be done by showing it to be discharged by the court, though upon an arrangement, and by consent(*f*).

867 *Malicious proceedings in bankruptcy.*—An action for a malicious prosecution will lie against persons who petition for an adjudication in bankruptcy, without reasonable or probable cause, and knowingly

(*c*) Churchill *v.* Siggers, 3 Ell. & Bl. 938; 23 Law J., Q. B. 308. Jennings *v.* Florence, 2 C. B., N. S. 467; 26 Law J., C. P. 277. Wentworth *v.* Bullen, 9 B. & C. 849. Saxon *v.* Castle, 6 Ad. & E. 659.

(*d*) Gilding *v.* Eyre, 31 Law J., C. P. 174.

(*e*) Huffer *v.* Allen, L. R., 2 Exch. 15.

(*f*) Craig *v.* Hasell, 4 Q. B. 499.

and wilfully, or recklessly, swear to depositions false in fact(*g*). In order, however, to prove a want of reasonable or probable cause, the proceedings must be superseded or set aside before the commencement of the action, for the very existence of a commission of bankruptcy has been held to be evidence of probable cause(*h*). The mere fact, however, of the proceedings having been superseded or set aside, does not of itself establish the fact of the want of probable cause for them, and the plaintiff must give some *primâ facie* evidence of want of probable cause, in order to put the defendant upon proof of the existence of probable cause(*i*).

868 *Malicious abuse of legal process.*—Whoever makes use of the process of the court for some private purpose of his own, not warranted by the exigency of the writ or the order of the court, is amenable to an action for damages for an abuse of the process of the court. Thus, where the defendant having instituted legal proceedings against the plaintiff, and caused a writ to be issued against him, employed the officer charged with the execution of the process to do a specific thing that he was not warranted by the writ to do, viz., to use it as a means of compelling the plaintiff to give up a ship's register, it was held that the defendant was responsible in damages to the plaintiff for causing him to be arrested and detained until he had given up the register, and for the injury he had sustained in being deprived of the register which he had given up to obtain his release from custody. And when the complaint is, that the process of the law has been abused and prostituted to an illegal purpose, it is perfectly immaterial whether or not it issued for a just cause of action, or whether the suit was legally terminated or not(*j*).

869 *Malicious detention of judgment debtors after tender of the debt and costs.*—The Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, authorizes the sheriff, gaoler, or person in whose custody a prisoner may be under a writ of *ca. sa.*, to discharge such prisoner on receiving

(*g*) Farley *v.* Danks, 4 Ell. & Bl. 499. Brown *v.* Chapman, 1 W. Bl. 427.

(*h*) Whitworth *v.* Hall, 2 B. & Ad. 698. See *post*, p. 760.

(*i*) Hay *v.* Weakley, 5 C. & P. 361. Cotton *v.* James, 1 B. & Ad. 134. See Johnson *v.* Emerson, L. R., 6 Exch. 329.

(*j*) Grainger *v.* Hill, 5 Sc. 580; 4 B. N. C. 212. Heywood *v.* Collinge, 9 Ad. & E. 274. See Keighly *v.* Bell, 4 F. & F. 763. Malicious abuse of legal process consists in wilfully employing it for some unlawful purpose; and it may exist where the party did not contemplate accomplishing more than the legal effect of the execution of the process. Mayer *v.* Walter, 64 Pa. St. 283.

Where an execution is taken out and levied under a judgment entered for a debt which the judgment creditor knew had been paid before the entry of the judgment, an action on the case for malicious abuse of process will lie whether such creditor caused such entry or not. Barnett *v.* Reed, 51 Penn. St. 190.

an order in writing from the attorney in the cause; but the attorney is not to give the discharge without the consent of his client, nor is the sheriff or gaoler, or person having the prisoner in custody, to liberate him, if the judgment creditor gives him notice not to do it. If, therefore, the latter, after tender of the amount of the judgment debt and costs, refuses to consent to the discharge of the prisoner, or interferes to prevent his liberation, he will be guilty of a wrongful act, and may render himself liable to an action for maliciously refusing to discharge the prisoner, and detaining him unlawfully in custody(*k*).

870 *Malicious arrest.*—By 32 & 33 Vict. c. 62, s. 6 (which is a re-enactment in effect of 1 & 2 Vict. c. 110, ss. 1 to 10), arrest on mesne process is abolished; but it is enacted, that if a plaintiff shall at any time before final judgment prove, by evidence on oath, to the satisfaction of a judge, that he has a cause of action against the defendant to the amount of 50*l.* or upwards, and that there is probable cause for believing that the defendant is about to quit England, then it shall be lawful for the judge to order the defendant to be arrested and imprisoned for a period not exceeding six months, unless he gives the requisite security, not exceeding the amount claimed in the action, that he will not leave England without the leave of the court.

The foundation, therefore, on which the liability of a person for a malicious arrest must now rest, is, that the party obtaining the order or authority from a judge for the arrest has imposed on the latter by some false statement, some *suggestio falsi* or *suppressio veri*, and has thereby satisfied him not only of the existence of the debt to the requisite amount, but also that there is reasonable ground for supposing the debtor to be about to quit the country. If, without fraud or falsehood, upon an affidavit(*l*) fairly stating the facts, the party succeeds in satisfying a judge that the defendant is about to quit the country, and so obtains an order for a capias to arrest him, he is not liable to an action, though the defendant had no such intention.

The party arrested has the power of making an application to a judge or the court praying to be discharged out of custody, and the discharge will be granted as a matter of course, if such party succeeds in satisfying the judge or court that he has not, nor ever had, the intention imputed to him; but the discharge affords no ground of action against the party procuring the arrest, if the original order for

(*k*) Crozer *v.* Pilling, 4 B. & C. 26.
(*l*) See Reg. Gen. Mich. T. 1869, R. 6; L. R., 5 Q. B. 670, 671.

arrest was fairly obtained(*m*), as it is a judicial act, and a person concerned in enforcing it is not responsible for its correctness(*n*). Where, however, the facts are not truly stated, and the court or judge has been put in motion without reasonable and probable cause, and the party making the affidavit(*l*), or procuring the order for the arrest, was guilty of falsehood, or of culpable negligence in swearing to facts without knowing whether they were true or false, there will be evidence of malice, and he will be responsible in damages(*o*).

Any statements or declarations made by the defendant tending to show that he had no reasonable or probable cause for believing, and did not believe, that the plaintiff was about to quit England, are of course evidence against him to show that he was actuated by malicious motives in procuring the order for the arrest(*p*).

The arrest by a sheriff, under a writ from any of the Queen's courts, of a person privileged from arrest by reason of his attendance as a witness under the process of another court, does not form the ground of any action at law against the sheriff or his officer, though it is alleged to have been done maliciously(*q*).

871 *What amounts to a malicious arrest—Proof of actual custody.*—Where the person submits to the process, or to the commands of an officer intimating that he is in custody, there is a perfect arrest. Actual contact is not necessary, as we have seen (*ante*, p. 697), to constitute an arrest. Where the defendant, for purposes of extortion, had placed a writ in the hands of a sheriff's officer, with instructions to arrest the plaintiff unless he would give up some property, and the officer finding his way to the plaintiff's sick-bed produced the writ and demanded the property, telling the plaintiff that unless it was delivered up to him a man would be left with him, and the plaintiff yielded to the pressure and gave up the property, it was held that these facts amounted in judgment of law to an arrest(*r*).

(*m*) Daniels *v.* Fielding, 16 M. & W. 207.
(*n*) Williams *v.* Smith, *ante*, p. 720.
(*o*) Gibbons *v.* Alison, 3 C. B. 185. Ross *v.* Norman, 5 Exch. 359. Carl *v.* Ayres, 53 N. Y. 14. Callahan *v.* Caffarata, 39 Mo. 136.
(*p*) Petrie *v.* Lamont, 4 Sc. N. R. 339; 3 M. & G. 702.
(*q*) Magnay *v.* Burt, 5 Q. B. 381.
(*r*) Grainger *v* Hill, 5 Sc. 580.

SECTION II.

OF ACTIONS FOR MALICIOUS ARREST AND MALICIOUS PROSECUTION(s).

872. *Parties to be made defendants.*—It is immaterial whether the defendant alone makes the charge, or whether he stirs up and procures another to do it. In either case he is liable in damages(t). If, for the gratification of his malice, a man gives his agent a plenary authority to institute a prosecution against another, he is equally responsible for all that is done under it; and if the agent have no cause for the proceeding, the principal is responsible, for it is his duty to inquire whether the proceeding be well founded or not. If, as against the agent, there was an absence of reasonable and probable cause for the prosecution, that is sufficient as against the principal, by whose authority and direction the agent acted(u). But if the agent institutes the proceeding of his own head, and without the instigation or direction of the principal, the latter will not be responsible for the unauthorized proceedings of his agent, unless he adopts them and continues them with knowledge of all the circumstances. When proceedings have been commenced by an agent without the knowledge of the principal, the responsibility of the latter commences at the point at which he becomes cognizant of the proceeding(x).

If an attorney maliciously, and without reasonable and probable cause, knowing that his client has no just claim against the plaintiff, assists in putting the law in motion, and effects an unlawful and malicious arrest, he, as well as his client who has authorized the proceeding, will be responsible in damages(y). If, in an action for a malicious prosecution against *A* and *B*, supported by proof that both *A* and *B* entered into a joint recognizance to prosecute and give evidence, it appear that *A* only employed the attorney, and that *B* attended before the magistrate and the grand jury at the request of the attorney, *B* will be entitled to an acquittal(z).

A railway company is not liable for a malicious prosecution insti-

(s) See 30 & 31 Vict. c. 142, s. 10, *ante*, p. 675.

(t) Savile *v.* Roberts, 1 Ld. Raym. 377. Mowry *v.* Miller, 3 Leigh, 561; Perdu *v.* Connerly 1 Rice, 49.

(u) Mitchell *v.* Williams, 11 M. & W. 213. Kinsey *v.* Wallace, 36 Cal. 462.

(x) Weston *v.* Beeman, 27 Law J., Exch. 57. See Burnaps *v.* Albert, Taney, 244.

(y) Stockley *v.* Hornidge, 8 C. & P. 16. Warfield *v.* Campbell, 35 Ala. 349. See Stansbury *v.* Fogle, 37 Md. 369.

(z) Eager *v.* Dyott, 5 C. & P. 4.

tuted by their servant without the knowledge or direction of the company, and a doubt has been thrown out as to whether a corporation can be actuated by that sort of malice which is essential to the maintenance of an action for a malicious prosecution(*a*).

If an attorney appears on behalf of a railway company to prosecute for an assault made upon one of the company's servants, and the prosecution fails, and an action for a malicious prosecution is subsequently brought, it will be assumed, until the contrary be shown, that the depositions of the witnesses were taken by or known to the attorney, and therefore to the company, before the prosecution was undertaken, and therefore if the depositions disclose a reasonable and probable cause for the prosecution, the company will not be liable, the onus of proving that there was no reasonable or probable cause lying upon the plaintiff(*b*).

873 *Pendency of a rule for a criminal information against the defendant.*—The mere fact of a criminal information being pending against the defendant on the prosecution of the plaintiff, for the same subject-matter, is no ground for staying the proceedings in the action; but if the plaintiff has resorted to his private remedy by way of action, the court will not in general allow him to proceed with the criminal information until the action has been discontinued(*c*).

874 *Declarations for a malicious prosecution.*—The declaration must aver the termination of the prosecution, and set forth the means by which it was ended; otherwise the plaintiff might recover in the action, and yet be afterwards convicted on the original prosecution(*d*). It must also aver that the proceedings terminated in favor of the plaintiff (*dd*),

(*a*) Stevens *v.* Mid. Rail. Co., 10 Exch. 352; 23 Law J., Exch. 328. See *ante*, pp. 730-1. In Vance *v.* Erie R. R. Co., 3 Vroom (N. J.), 334, it was decided that an action for malicious prosecution may be maintained against a corporation.

But in Owsley *v.* Montgomery, etc., R. R. Co., 37 Ala. 560, it was held that an action on the case for malicious prosecution could not be maintained against a corporation, but that an action in trespass for false imprisonment would lie.

(*b*) Walker *v.* South-East. Rwy., L. R., 5 C. P. 640.

(*c*) Caddy *v.* Barlow, 1 M. & Ry. 278. Rex *v.* Sparrow, 2 T. R 198.

(*d*) Fisher *v.* Bristow, 1 Doug. 215. Arundell *v.* Tregono, Yelv. 116. Smith *v.* Shackelford, 1 N. & M. 36. Teague *v.* Wilks, 3 McCord, 461. Turner *v.* Walker, 3 Gill & Johns. 377.

(*dd*) Harris *v.* Easall, 2 Penn. 843. Grant *v.* Moore, 29 Cal. 644. Steel *v.* Williams, 18 Ind. 161. Wood *v.* Laycock, 3 Met. (Ky.) 192. Gorton *v.* De Angelis, 6 Wend. 418.

If the prosecution was terminated by the verdict of a jury, the declaration should allege that the plaintiff was "acquitted." Law *v.* Franks, Cheves, 9. Hester *v.* Hagood, 3 Hill (S. C.), 195.

If the prosecution was terminated by the entry of a *nolle prosequi*, the action is not maintainable. Bacon *v.* Towne, 4 Cush. 217. Driggs *v.* Burton, 44 Vt. 124.

The declaration must also distinctly allege that the prosecution was without probable cause. Dennehey *v.* Woodsum, 100 Mass. 195. Given *v.* Webb, 7 Rob. (N. Y.) 65. Burkhart *v.* Jennings, 2 W. Va. 442. Mitchell *v.* Mattingly, 1 Met. (Ky.) 237. Chelf *v.* Penn, 2 Met. (Ky.) 468. But

if from their nature they be capable of such a termination, and it is not sufficient to allege that the plaintiff was convicted, and that there was by law no appeal against such conviction(*e*). If there be any special damage it should be stated, with such reasonable particularity as to give notice to the defendant of the peculiar nature of the injury(*f*).

875 *Of the plea of not guilty in actions for a malicious arrest and malicious prosecution.*—The plea of not guilty in actions for a malicious arrest, malicious prosecution, and maliciously presenting a petition in bankruptcy, puts in issue the fact of the arrest of the prosecution, etc., by or through the instrumentality of the defendant, the question of malice, and of the existence of reasonable and probable cause for the prosecution(*g*), but not the fact of the discontinuance or termination of the proceedings. If, therefore, the declaration avers the discontinuance of the prosecution, or the termination of the proceedings by a dismissal of the complaint, charge, or petition, these material allegations must be specially traversed, in order to put the plaintiff upon proof of them(*h*).

876 *Pleas of justification.*—If the defendant, instead of relying on the plea of not guilty, elects to bring the facts before the court in a plea of justification, he must allege as a ground of defence that the facts and circumstances, which he relies upon as showing reasonable and probable cause for the institution of the prosecution, were known to him at the time the charge was made, and formed the reason and inducement for his putting the law in motion(*i*).

see Parsons *v.* Harper, 16 Gratt. (Va.) 64. An allegation of the want of any just cause is insufficient. Ellis *v.* Thilman, 3 Cal. 3.

An averment of want of probable cause is not contained in an averment of malice, nor in an allegation that the charge was false. Given *v.* Webb, 7 Rob. (N. Y.) 65. Maddox *v.* McGainnis, 7 Monr. 371.

Malice must also be averred and proved. Turner *v.* Walker, 3 Gill & Johns. 377. And the special circumstances of malice should be set out. Elkinton *v.* Deacon, 1 Penn. 160. Courter *v.* Wood, 2 id. 616. As well as any arrest or special grievance. Allgor *v.* Stillwell, 1 Halst. 166.

(*e*) Basébé *v.* Matthews, L. R., 2 C. P. 684.

(*f*) *Post*, ch. 22, s. 1.

(*g*) Cotton *v.* Browne, 3 Ad. & E. 312. Probable cause is not admissible in evidence under the general issue, but must be specially pleaded. Faust *v.* McDaniel, 1 Brevard, 173. But see Radde *v.* Ruckgaber, 3 Duer, 684. A plea stating in general terms that the defendant had a probable cause for the prosecution is insufficient. Brown *v.* Connelly, 5 Blackf. 390. The plea should set out the facts on which the defendant prosecuted. Legrand *v.* Page, 7 Monr. 401.

(*h*) Watkins *v.* Lee, 5 M. & W. 270. Atkinson *v.* Raleigh, 3 Q. B. 85. Haddrick *v.* Heslop, 12 ib. 275.

(*i*) Delegal *v.* Highley, 5 Sc. 169; 3 B. N. C. 950. As to interrogatories in such a case, see Stewart *v.* Smith, L. R., 2 C. P. 293. See Von Kettler *v.* Johnson, 57 Ill. 109, for the requisites of a plea of justification in an action for malicious arrest and imprisonment.

877 *Evidence at the trial—Proof on the part of the plaintiff (k)—Malicious arrest or prosecution.*—In an action against a defendant for a malicious arrest under a judge's order, the plaintiff must, under the plea of not guilty, be prepared to prove the affidavit made by the defendant before the judge by production of the original or an examined or office copy(*l*), and must show that the defendant made the affidavit, or used it(*m*). The judge's order for holding the plaintiff to bail should be proved by production of the original order, purporting to be signed by one of the judges of the superior courts(*n*). The arrest of the plaintiff by virtue of the order, at the instance of the defendant, or by his procurement, may be established by the defendant's declarations and conduct in the matter of the arrest, and the surrounding circumstances of the case, as well as by the production of the writ and warrant.

Where the plaintiff put in evidence the judge's order, and a writ of capias which had been issued thereon and lodged with the sheriff, but the capias was not shown to have been returned, neither was any warrant produced, but it was proved that on the defendant being told that the plaintiff was in custody he said, as he had got him fast he would punish him, and further, that his attorney attended before the judge to oppose the plaintiff's discharge, it was held that there was sufficient proof against the defendant, without the production and proof of any warrant(*o*). If the defendant has not by his conduct and declarations admitted that the arrest was made by his orders and directions, the writ under which the arrest was effected may be proved by production of the original writ, sealed with the seal of the court; or if it has been returned and become matter of record, it may be proved by a certified or examined copy. The warrant from the sheriff to his officer may be proved in like manner(*p*), and the fact of the

(*k*) As to interrogatories, where the action is against a municipal corporation, see McFadzen *v.* Mayor, etc., of Liverpool, L. R., 3 Exch. 279. When the defendant pleads the general issue to an action on the case for a malicious criminal prosecution, the plaintiff must prove: (1) The fact of the prosecution; (2) That the defendant was himself the prosecutor or instigated the proceeding; (3) That it terminated in favor of the accused; (4) That the charge was unfounded; (5) That it was made without probable cause; and, (6) That the defendant in making or instigating it was actuated by malice. Wheeler *v.* Nesbitt, 24 (How. U. S.) 544 Wells *v.* Parsons, 3 Harring. 505. Hardin *v.* Borders, 1 Ired. 143. Feazle *v.* Simpson, 1 Scam. 30. Hurd *v.* Shaw, 20 Ill. 354.

(*l*) Arundell *v.* White, 14 East, 224. Crook *v.* Dowling, 3 Doug. 75. Casburn *v.* Reid, 2 Moore, 60. Turpin *v.* Remy, 3 Blackf. 210. Conduit *v.* Dicken, id. 216. Cooper *v.* Turrentine, 17 Ala. 13.

(*m*) Rees *v.* Bowen, McClel. & Y. 392. See *ante*, p. 756-7.

(*n*) 8 & 9 Vict. c. 113, s. 2, *post*, ch. 21, s. 1.

(*o*) Petrie *v.* Lamont, 3 M. & Gr. 707.

(*p*) *Post*, ch. 21, s. 1.

arrest may be established by the evidence of the officer who effected it, and by the plaintiff's own testimony in the matter(*q*).

The fact of the defendant's name being on the back of the bill of indictment does not prove that he was the prosecutor of the indictment, for the name of any person who can give evidence respecting the subject-matter of the indictment may properly be put upon the back of the bill(*r*). The mere fact of a person having attended at the trial and given evidence as a witness, is no proof of his having instituted or instigated the prosecution(*s*). Having proved that the defendant instigated the prosecution, it must then be shown that it was done maliciously, and without reasonable and probable cause (see *ante*, p. 742). The plaintiff must give general evidence, showing that there was no reasonable ground for the prosecution(*t*).

878 *Proof of malicious informations and complaints before magistrates.*—The 11 & 12 Vict. c. 42, s. 17, requires all magistrates before whom any person shall appear, or be brought charged with any indictable offence, to take the statement on oath or affirmation of those who know the facts and circumstances of the case, and to put the same into writing, and cause them to be read over to, and signed by, the witnesses, before they commit the accused person for trial, or admit him to bail. These depositions are afterwards (s. 20) to be delivered to the proper officer of the court in which the person committed or bailed is to be tried, and the latter is (s. 27) to be furnished with a copy thereof on application to the officer or person having custody of the same.

Where the charge or complaint, or the examination, is by law required to be taken down in writing, it is always to be presumed that this was done, although the party was discharged on the ground that no case was made out against him. Unless, therefore, positive evidence be given that the examinations were not taken down, oral evidence cannot be given of what took place before magistrates(*u*); for where matters are required by statute to be reduced into writing for the purpose of evidence, the writing is considered to be the best evidence, and must be produced, unless it can be shown to have been lost or destroyed. If it be proved that no depositions were taken, or that

(*q*) See *ante*, p. 697, *et seq.*

(*r*) Girlington *v.* Pitfield, 1 Ventr. 47.

(*s*) Eager *v.* Dyott, 5 C. & P. 5. As to proof of the defendant's connection with the prosecution, see Kline *v.* Shuler, 8 Ired. 484.

(*t*) Incledon *v.* Berry, 1 Campb. 204, n. See *post*, p. 763.

(*u*) Parsons *v.* Brown, 3 C. & K. 296.

they were taken but not signed, then oral evidence of what took place before the magistrates is admissible(*x*).

In order, therefore, to prove the proceedings before magistrates, it is in general necessary to serve the magistrate's clerk with a subpœna *duces tecum*, if the proceedings are in his custody; but if they have been returned to the clerk of the peace, or his deputy, or to the clerk of the arraigns, then the officer who has the custody of them is the proper person to be summoned to produce them. If the officer in whose custody they ought to be, if they exist, has searched for them and cannot find them, secondary evidence may be given of their contents(*y*). The oath and handwriting of the defendant should be proved, and the issue of the warrant on the strength of the information. If the charge was dismissed and was not taken down in writing, or if it was of such a nature, or made under such circumstances, that there was no obligation imposed by law upon the justices to take it down in writing, the nature of it may be proved by any person who was present and heard the charge made(*z*).

In all actions against persons for going before justices of the peace, and lodging a complaint or information against the plaintiff, and obtaining a warrant for his arrest, and causing him to be arrested, it must be proved that the complaint and wrongful acts of the defendant in the matter were done maliciously, and without reasonable and probable cause. If it appears that the defendant laid his case before a magistrate, that the magistrate issued a summons, which was served on the plaintiff, requiring him to appear and answer the complaint, and that the plaintiff chose to take no notice of the summons, whereupon the magistrate directed a warrant to issue, upon which the plaintiff was arrested, the defendant will not be responsible for the arrest, as it was caused by his own negligence and misconduct, rather than by the complaint made against him by the defendant(*a*).

879 *Proof by certified copy of the record of the prosecution and acquittal.*—The 14 & 15 Vict. c. 99, enacts (s. 13), that in order to prove the trial and acquittal of any person charged with any indictable offence, it shall not be necessary to produce the (original) record of the trial and acquittal, or a copy thereof, but it shall be sufficient that it be certified,

(*x*) Jeans *v.* Wheedon, 2 M. & Rob. 486. See R. *v.* Reed, M. & M. 403. See Brown *v.* Randall, 36 Conn. 56.

(*y*) Freeman *v.* Arkell, 2 B. & C. 494.

(*z*) Clarke *v.* Postan, 6 C. & P. 423. See Spears *v.* Cross, 7 Port. 437, Brown *v.* Randall, 36 Conn. 56.

(*a*) Philips *v.* Naylor, 4 H. & N. 615; 27 Law J., Exch. 224; 28 Ib. 235. See *ante*, p. 718-9; *post*, ch. 14, s. 2.

or purport to be certified, under the hand of the clerk of the court, or other officer having the custody of the records of the court where the acquittal took place, or by the deputy of such clerk or other officer, that the paper produced is a copy of the record of the indictment, trial, and acquittal, omitting the formal parts thereof(*b*). It has been declared by Willes, C.J., that "every prisoner upon his acquittal, has an undoubted right and title to a copy of the record of such acquittal, for any use he may think fit to make of it, and that, after a demand of it has been made, the proper officer may be punished for refusing to make it out"(*c*).

880 *Proof of malice and of want of reasonable and probable cause.*—Scandalous charges and accusations made by the defendant against the plaintiff in connection with the prosecution, are evidence of malice. Where the defendant put an advertisement in the newspapers of the finding of the indictment by the grand jury, the advertisement was held to be admissible in evidence to prove the malice of the defendant, although an information had been granted for it as a libel, but the jury were directed not to consider it in estimating the damages(*d*).

The question of probable cause is a mixed proposition of law and fact. Whether the circumstances alleged to show it probable or not probable, are true and existed, is a matter of fact; but whether, supposing them to be true, they amount to probable cause, is a question of law for the decision of the judge(*e*). The *bonâ fide* belief of

(*b*) *Post*, ch. 21, s. 1. Hunter *v.* French, Willes, 517. Caddy *v.* Barlow, 1 M. & Ry. 277. See Katterman *v.* Stitzer, 7 Watts, 189; Sayles *v.* Briggs, 4 Met. 421; Williams *v.* Woodhouse, 3 Dev. 257; Kelley *v.* Pickett, 2 Brevard, 144; Fant *v.* McDaniel, 1 Brevard, 173.

(*c*) Rex *v.* Brangan, 1 Leach, C. C. 27. And see the statute 46 Edw. 3, cited Taylor on Evidence, s. 1340, p. 1265, n. 4, 4th ed., and printed in the appendix to the 9th vol. of the Statutes at Large, p. 45, 4th ed.

(*d*) Chambers *v.* Robinson, 2 Str. 691.

(*e*) Busst *v.* Gibbons, 30 Law J., Exch. 75. Johnstone *v.* Sutton, 1 T. R. 545. Panton *v.* Williams, 2 Q. B. 193. James *v.* Phelps, 11 Ad. & E. 483; Anon. 6 Mod. 73. Clements *v.* Ohrly, 2 C. & K. 689. Mitchell *v.* Jenkins, 5 B. & Ad. 594. Cole *v.* Curtis, 16 Minn. 182. Driggs *v.* Burton, 44 Vt. 124. Hill *v.* Palm, 38 Mo. 13. Whitfield *v.* Westbrook, 40 Miss. 311. Kidder *v.* Parkhurst, 3 Allen (Mass.), 393. Burkett *v.* Lanata, 15 La. An. 337. Israel *v.* Brooks, 23 Ill. 575. Wade *v.* Walden, 23 Ill. 425. Center *v.* Spring, 2 Clarke (Iowa), 393. Taylor *v.* Godfrey, 36 Me. 525. Stone *v.* Crocker, 24 Pick. 81. Travis *v.* Smith, 1 Penn. St. 234. Leggett *v.* Blount, 2 Taylor, 123. Cloon *v.* Gerry, 13 Gray (Mass.), 201. Besson *v.* Southard, 10 N. Y. 236. Hemmenway *v.* Woods, 1 Pick. 524. Marston *v.* Deyo, 2 Wend. 424. Lipford *v.* M'Collum, 1 Hill (S. C.), 82. Munro *v.* Dupont, 3 Wash. C. C. 31. Turner *v.* Walker, 3 Gill & Johns. 377.

If there is no controversy about the facts, the question of probable cause is for the court. Bessen *v.* Southard, 10 N. Y. 236. Cloon *v.* Gerry, 13 Gray (Mass.), 201. Taylor *v.* Godfrey, 36 Me. 525.

If the facts are contested, the court should leave them to the jury with instructions as to what is probable cause. Besson *v.* Southard, 10 N. Y. 236. Weinberger *v.* Shelly, 6 Watts & Serg 336. Travis *v.* Smith, 1 Penn. St. 234. Nash *v.* Orr, 3 Brevard, 94. Paris *v.* Waddell, 1 M'Mullan, 358. Greenwade *v.* Mills, 31 Miss. 464.

the defendant in the truth of the charge preferred by him against the plaintiff, and in the plaintiff's guilt, is essential to the establishment of reasonable and probable cause for a criminal prosecution, and it is for the jury to determine what was the defendant's belief in the matter, and whether, if he believed the plaintiff to have done what he imputed to him, he had reasonable grounds for that belief; for if he formed his conclusion rashly and inconsiderately, he is not warranted in acting on his belief(*f*). If the want of reasonable and probable cause for the prosecution is so strong and plain as to amount to evidence of malice, that must be shown by the plaintiff. An abandonment of the prosecution, or an acquittal for want of evidence, is, as we have seen, no proof of malice, or of the prosecution being unfounded and unjust(*g*).

The rule is, that however complicated the facts may be on which the question of reasonable and probable cause may depend, the judge must leave the facts to the jury, and on the facts found by them determine for himself whether there is reasonable or probable cause or not(*h*). "There have been some cases," observes Tindal, C.J., "which appear at first sight to have somewhat relaxed the application of the rule, but there has been no real departure from it. In some cases the reasonableness and probability of the ground for the prosecution has depended, not merely upon the proof of certain facts, but upon the question whether other facts which furnished an answer to the prosecution were known to the defendant at the time it was instituted. In other cases the question has turned upon the inquiry, whether the facts stated to the defendant at the time, and which formed the ground of the prosecution, were believed by him or not. In other

(*f*) Douglass *v.* Corbett, 6 Ell. & Bl. 514. Dawson *v.* Van Sandau, 11 W. R. 516. See page 744, note *p*.

(*g*) Purcell *v.* Macnamara, 1 Campb. 202; 9 East, 363. See *ante*, p. 742. It has been repeatedly held that the entry of a nolle prosequi by the prosecuting attorney is not such a termination of an indictment as to warrant a recovery for malicious prosecution. Driggs *v.* Burton, 44 Vt. 124. Parker *v.* Farley, 10 Cush. (Mass.) 279. Bacon *v.* Towne, 4 Cush. 217. Burhans *v.* Sanford, 19 Wend. 417.

But if the indictment is quashed and the defendant discharged by the judgment of the court, there is such a termination of the prosecution as will support the action. Hays *v.* Blizzard, 30 Ind. 457.

The acquittal of a party by the court before which he was tried is *prima facie* evidence of want of probable cause. Hill *v.* Palm, 38 Mo. 13. Chapman *v.* Dodd, 10 Minn. 350. McBean *v.* Ritchie, 18 Ill. 114. But see Adams *v.* Lisher, 3 Blackf. 445.

But a discharge by the magistrate before whom he was examined for an imputed crime is not. Israel *v.* Brooks, 23 Ill. 575. Wade *v.* Walden, 23 Ill. 425. Thorpe *v.* Balliett, 25 Ill. 339. But see Sayles *v.* Briggs, 4 Met. 421; Johnston *v.* Martin, 3 Murph. 248; Bostick *v.* Rutterforth, 4 Hawks, 83; Cooper *v.* Utterbach, 37 Md. 282. Nor is an acquittal before a justice who had no jurisdiction of the case. Bixby *v.* Brundige, 2 Gray (Mass.), 129.

(*h*) Douglass *v.* Corbett, 6 Ell. & Bl. 515. See *ante*, p. 728.

cases the inquiry has been whether, from the conduct of the defendant himself, the jury will infer that he was conscious he had no reasonable and probable cause. But in these, and many other cases which might be suggested, it is obvious that the knowledge, and belief, and the conduct of the defendant, are so many additional facts for the consideration of the jury, so that, in effect, nothing is left to the jury but the truth of the facts proved and the justice of the inference to be drawn from such facts, the judge determining as matter of law, according as the jury find the facts proved or not proved, and the inferences warranted or not, whether there was reasonable and probable ground for the prosecution, or the reverse "(*i*).

881 *Proof on the part of the defendant.*—If the plaintiff makes out a *primâ facie* case of malice, and of want of reasonable and probable cause for the prosecution, the defendant must bring forward circumstances to show that he acted *bonâ fide*, and had reasonable ground for believing that the facts within his knowledge constituted the offence which he charged(*k*). In order to show *bonâ fides* on the part of the defendant, it is competent to him to prove any communication that may have been made to him prior to the commission of the grievance, to show the impression made on his mind, and the materials he had before him in forming an opinion. If the plaintiff had previously been guilty of felony, and the defendant was present at the trial, or had seen a record of the conviction which induced him to act in the matter of the complaint, these facts are receivable as evidence of *bonâ fides*(*l*).

(*i*) Panton *v.* Williams, 2 Q. B. 194. Taylor *v.* Willans, 2 B. & Ad. 856. Broad *v.* Ham, 8 Sc. 48.

(*k*) Weston *v.* Beeman, 27 Law J., Exch. 57. Turner *v.* Ambler, 10 Q. B. 260. Delegal *v.* Highley, 5 Sc. 169. In an action for malicious prosecution the plaintiff must prove both malice and want of probable cause, as these are the essential elements of the action; and whatever the plaintiff may prove, the defendant is at liberty to disprove. He may, therefore, show both the absence of malice and the existence of probable cause; and any evidence pertinent to either issue is admissible. McKown *v.* Hunter, 30 N. Y. 625. Barron *v.* Mason, 31 Vt. 189. McLaren *v.* Birdsong, 24 Ga. 265. Lyon *v.* Hancock, 35 Cal. 372. Ammerman *v.* Crosby, 26 Ind. 451.

Thus where the malicious prosecution consisted in making a complaint against the plaintiff on a charge of perjury, the defendant may testify that at the time of making the complaint he believed that the evidence given by the plaintiff was material and that he was guilty of the offence charged. McKown *v.* Hunter, 30 N. Y. 625. See White *v.* Tucker, 16 Ohio St. 468.

The defendant may also show the threats of the plaintiff to commit the offence of which he was charged. Goggans *v.* Monroe, 31 Ga. 331.

Or admissions by the plaintiff of absence of malice in the prosecution, and of the existence of probable cause. Wade *v.* Walden, 23 Ill. 425.

The defendant may also show that at the time of the prosecution the plaintiff was generally reputed to be guilty of acts similar to the one charged. Barron *v.* Mason, 31 Vt. 189. But see Gregory *v.* Thomas, 2 Bibb, 286.

(*l*) Thomas *v.* Russell, 9 Exch. 764.

It is no answer to an action for a malicious prosecution to show that the indictment preferred against the plaintiff was not sustainable in point of law, "for a bad indictment serves all the purposes of malice, by putting the party to expense and exposing him, but no purpose of justice in bringing the party to punishment if he were guilty"(*m*). When the plaintiff in his declaration avers that up to the time of the prosecution by the defendant he had borne a good character, and claims damages for injury to his character, it may be shown, on cross-examination of the plaintiff's witnesses, that he was at the time a man of notoriously bad character(*n*). But where the plaintiff does not, in his declaration, expressly claim damages in respect of injury to reputation, general evidence as to the plaintiff's character is inadmissible(*o*). Such general evidence affords no proof of probable cause for a prosecution(*p*).

882 *Of the damages recoverable in actions for a malicious prosecution.*—In order to recover damages in an action for a malicious prosecution, the plaintiff must show that he has suffered either in person, reputation, or pocket. If, therefore, an indictment is prepared for a common assault, and is ignored by the grand jury, and the party indicted brings his action for a malicious prosecution, he must give some proof of actual damage(*q*), and must show that he was forced to expend his money in necessary charges to acquit himself of the misdemeanor of which he was accused; for if ignoramus be returned where the indictment neither contains matter of scandal nor cause for imprisonment, or loss of life or limb, no action will lie; but if there is scandal, or loss of liberty, etc., an action will lie. "There are," observes Holt, C.J., "three sorts of damages resulting from a malicious and unfounded indictment, any of which would be sufficient to support an action: 1. The damage to a man's fame, as if the matter whereof he is accused be scandalous. 2. Where a man is put in danger to lose his life, limb or liberty. 3. The damage to a man's property, as where he is forced to expend his money in necessary charges to acquit himself of the crime of which he is accused"(*r*).

(*m*) Wicks *v.* Fentham, 4 T. R. 248. Pippet *v.* Hearn, 1 D. & R. 271. Shaul *v.* Brown, 28 Iowa, 37. See Barton *v.* Kavanaugh, 12 La. An. 332; Streight *v.* Bell, 37 Ind. 550.

(*n*) Rodriguez *v.* Tadmire, 2 Esp. 721; *post*, ch. 17, s. 3.

(*o*) Downing *v.* Butcher, 2 M. & Rob. 374. Cornwall *v.* Richardson, Ry. & M. 305. See Baker *v.* Hopkins, 1 A. K. Marsh. 587; Rogers *v.* Lamb, 3 Blackf. 155.

(*p*) Newsam *v.* Carr, 2 Stark. 70. See Thomas *v.* Russell, *supra*. But see Martin *v.* Hardesty, 27 Ala. 458; Bostick *v.* Rutherford, 4 Hawks, 83; Scott *v.* Fletcher, 1 Overt. 488.

(*q*) Freeman *v.* Arkell, 3 D. & R. 671. Byne *v.* Moore, 5 Taunt. 191.

(*r*) Savile *v.* Roberts, 1 Ld. Raym. 378. See Sheldon *v.* Carpenter, 4 N. Y. 579; Rockwell *v.* Brown, 36 N. Y. 207, 209.

If two persons are indicted without reasonable and probable cause for a conspiracy, and one employs an attorney to defend them, and pays him the costs of the defence, and both are acquitted, and an action is brought up for a malicious prosecution and a verdict is given for the plaintiff, he is entitled to recover the amount of the attorney's bill as part of the damages, unless each had a distinct defence and the costs thereof were severable(*s*). Every expense that the plaintiff has necessarily incurred in order to defend himself from the false and malicious charge brought against him is recoverable as part of the damages, if the plaintiff has claimed it in his declaration(*t*).

In an action for a malicious prosecution, where the jury gave the plaintiff 10,000*l.* damages, the court refused a new trial, saying they would not interpose on account of the largeness of the damages, unless they were so flagrantly excessive as to afford internal evidence of prejudice and partiality on the part of the jury; that is, unless they were most outrageously disproportionate either to the wrong received or to the situation and circumstances of either the plaintiff or the defendant(*u*).

(*s*) Rowlands *v.* Samuel, 11 Q. B. 41.
(*t*) Foxall *v.* Barnett, *ante*, p. 736.
(*u*) Leith *v.* Pope, 2 W. Bl. 1326. See Beno *v.* Wilson, 49 Ill. 95.

CHAPTER XIV.

OF TRESPASSES IN EXECUTION OF VOID OR IRREGULAR PROCESS —RESPONSIBILITY OF JUDGES AND MINISTERIAL OFFICERS OF JUSTICE, AND PERSONS SETTING THEM IN MOTION.

SECTION I.—*Of trespasses committed in the execution of void or irregular legal process.*—Exemption of judges, arbitrators, etc., from actions where they had a *primâ facie* jurisdiction—Conditions precedent to the existence of jurisdiction—Disqualification of judges, etc., on account of interest—Orders of commitment—Contempt of court—Proceedings against county court judges to compel them to act—Proceedings of courts-martial—Who are judges and judicial officers—Wrongful delegation of judicial functions—Revision of proceedings of inferior courts.

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SECTION III.—*Actions against judges, sheriffs, bailiffs, and ministerial officers and their assistants, and parties setting them in motion.*—Notice of action—Staying proceedings in actions against sheriffs, their officers and assistants—Statutory protection to high bailiffs and persons acting in the execution of county court warrants—Staying proceedings in actions against high bailiffs, etc.—Statutory protection in favor of persons acting in execution of the Bankrupt Acts—Parties to actions against sheriffs and ministerial officers, and parties acting under warrant of the court of bankruptcy—Pleadings, defences, and evidence—Damages recoverable—Exemplary damages—Treble damages.

SECTION I.

OF TRESPASSES IN EXECUTION OF VOID OR IRREGULAR PROCESS—RESPONSIBILITY OF JUDGES AND MINISTERIAL OFFICERS OF COURTS OF JUSTICE, AND PERSONS SETTING THEM IN MOTION.

883 *Exemption of judges from actions in respect of things done in the exercise of their judicial functions.*—When the executive power of the sovereign has been delegated to others, to be by them put in force in the form prescribed by law, the power thus conferred is termed an authority in law, and affords a justification for all acts and trespasses committed in the exercise of it, so long as the authority has not been abused or exceeded. Neither the judges in the king's courts nor any judicial officers are liable to answer personally for their judicial acts. An action, therefore, will not lie against a judge for a wrongful commitment or an erroneous judgment, nor for any act done by him in his judicial capacity(*a*); nor against a grand juryman for wrongfully presenting and finding a bill of indictment; nor against a petty juryman for a wrong verdict; nor against the vice-chancellor of the university for a wrongful imprisonment(*b*); nor against a coroner, who is a judicial officer, for any matter done by him in the exercise of his judicial functions. If, therefore, a coroner thinks that an inquest ought to be conducted in secresy, he has power to exclude all persons not necessarily engaged in the inquiry; and if the exclusion of any particular person appears to him to be necessary or proper, it is for him to decide who is to be excluded. And if a person has by order of the coroner been forcibly turned out of a room when an inquisition was about to be taken, the person so expelled has no right of action against the coroner for an assault(*c*).

(*a*) Hammond *v.* Howell, 1 Mod. 184; 2 Mod. 219. Bradley *v.* Fisher, 13 Wall. 335. Londegan *v.* Hammer, 30 Iowa, 508; Bailey *v.* Wiggins, 5 Harring. (Del.) 463. Hetfield *v.* Towsley, 3 Iowa, 584. Deal *v.* Harris, 8 Md. 40. Tyler *v.* Alford, 38 Me. 530. Hamilton *v.* Williams, 36 Ala. 527. Adkins *v.* Brewer, 3 Cow. 206. Jordan *v.* Hanson, 49 N. H. 199. Tates *v.* Lansing, 5 Johns. 282; 9 id. 395. Pratt *v.* Gardner, 2 Cush. (Mass.) 68. Downing *v.* Herrick, 47 Me. 462. Brodie *v.* Rutledge, 2 Bay, 69. Ambler *v.* Church, 1 Root, 211. Phelps *v.* Sill, 1 Day, 315. Moor *v.* Ames, 3 Caines, 170. Vanderheyden *v.* Young, 11 Johns. 150. Ely *v.* Thompson, 3 Marsh. 76. Little *v.* Moore, 1 South. 74.

(*b*) Kemp *v.* Neville, 10 C. B., N. S. 523; 31 Law J., C. P. 158.

(*c*) Garnett *v.* Ferrand, 6 B. & C. 611. A justice of the peace in the progress of a trial before him, has authority to cause any person to be removed from the court room if in his opinion the presence of such party will be prejudicial to the interests of justice. State *v.* Copp, 15 N. H. 212.

"*Arbitrators* whom parties by consent have chosen to be their judges shall never," observes Lord Holt, "be arraigned more than any other judges,"(*d*) for if it should be allowed to make arbitrators defendants, and give them the trouble to defend their judgments and set forth the particular reasons upon which they founded their award, it would introduce very great inconvenience, and be a discouragement to any person to undertake a reference. If there is any palpable mistake made by an arbitrator, or any miscalculation in an account laid before him, the person aggrieved may bring his bill of complaint against the party in whose favor the award is made to have it rectified, but not against the arbitrator(*e*). Arbitrators, therefore, are not responsible in damages for their mistakes or omissions, or for negligence or carelessness in the discharge of the duties intrusted to them; but if they abuse the office of judge, and act fraudulently and corruptly, or maliciously, they are answerable in damages to the parties grieved(*f*). Where, under a building contract, an architect is clothed with the duties of an arbitrator in the settlement of differences arising between the builder and employer, and in determining charges to be made for extras, he cannot be made responsible for mere errors of judgment in the discharge of the duties devolved upon him, but he may be sued for neglecting to exercise the functions he has undertaken to perform, and any undue bias under which he labors will invalidate his award(*g*). If arbitrators neglect to hear one of the parties, it will invalidate their award, and will be good ground for setting it aside, but it cannot be pleaded to an action on the award(*h*). The general rule as regards judges and judicial officers is, that if they do any act beyond the limit of their authority causing injury to another, they thereby subject themselves to an action for damages; but if the act done be within the limit of their authority, through an erroneous or mistaken judgment, they are not liable to an action(*i*). A judge, therefore, is

(*d*) Morris *v.* Reynolds, 2 Ld. Raym. 857.

(*e*) Ld. Hardwicke, Anon. 3 Atk. 644.

(*f*) Wills *v.* Maccarmick, 2 Wils. 148. Tozer *v.* Child, 7 Ell. & Bl. 383. See *Re* Hopper, L. R., 2 Q. B. 367. Pappa *v.* Rose, L. R., 7 C. P. 32. Pappa *v.* Rose, has been affirmed on appeal, L. R., 7 C. P. 525.

(*g*) Kemp *v.* Rose, 1 Giff 258. See Kimberley *v.* Dick, L. R. 13 Eq. Ca. 1.

(*h*) Thorburn *v.* Barnes, L. R., 2 C. P. 384.

(*i*) Doswell *v.* Impey, 1 B. & C. 169. Gahan *v.* Lafitte, 5 Moore, P. P. C. 382. Blood *v.* Sayre, 17 Vt. 609. Adkins *v.* Brewer, 3 Cow. 206. Clark *v.* Spicer, 6 Kans. 440. Revill *v.* Pettitt, 3 Met. (Ky.) 314. Craig *v.* Burnett, 32 Ala. 728. Burnham *v.* Stevens, 33 N. H. 247.

It has been held that the true rule as to the personal liability of a judge is, that he is personally responsible only for errors committed in the arbitrary, corrupt and malicious exercise of an assumed judicial authority, without regard to the question of his jurisdiction. Cope *v.* Ramsey, 2 Heisk. (Tenn.) 197. In Bradley *v.* Fisher, 13 Wall. 335, it was held that judges of courts of record of superior or general jurisdiction, are not liable to civil actions for

not answerable for slander spoken by him in the exercise of his judicial functions in reference to a matter before him, although it be spoken maliciously and without reasonable cause, and be irrelevant and not *bonâ fide* in the discharge of his duty as judge(*j*); but if he goes out of his way to make slanderous attacks upon the character of private persons in respect of matters not before him, and unto which he has no jurisdiction to inquire, he will be responsible like any other individual for the consequences(*k*).

Where parties are not acting as judges, but have only a discretion confided to them, an erroneous exercise of that discretion, however plain the miscarriage may be, will not render them answerable in damages, provided they have due legal authority and power to act in the matter. And where the law neither confers judicial power, nor any discretion at all, but requires certain things to be done, everybody on whom the duty of obedience attaches is bound to do the act required, and is responsible in damages for the consequences of his disobedience or neglect(*l*).

This freedom from action and suit is given to judges, not so much for their own sake, as for the sake of the public and for the advancement of justice, "that, being free from actions, they may be free in thought and independent in judgment, as all who are to administer justice," observes Lord Tenterden, "ought to be."

884 *Conditions precedent to the existence of jurisdiction on the part of a judge.* —Every judge of a court of inferior jurisdiction must have before him some cause of action, charge, or complaint, into which he has by law

their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. But it was held that the rule was otherwise as to acts done by them in the absence of all jurisdiction over the subject matter.

In a large class of cases the rule exempting judges from liability for judicial acts within their discretion, has been qualified with the proviso that such acts were not done wilfully, fraudulently, corruptly or maliciously. See Berard *v.* Hoffman, 18 Md. 479; Morgan *v.* Dudley, 18 B. Mon. 693; Gregory *v.* Brown, 4 Bibb, 28; State *v.* Campbell, 2 Tyl. 177; Bullitt *v.* Clement, 16 B. Mon. 193.

But in New York it has been held that whenever duties of a judicial nature are imposed upon a public officer, the due execution of which depends upon his own judgment, he is exempt from all responsibility by action for the motives which influenced him, and the manner in which such duties are performed; that if such officer be corrupt he may be impeached or indicted, but cannot be prosecuted by an individual to obtain redress for the wrong which may have been done. Rochester White Lead Co. *v.* City of Rochester, 3 N. Y. 463.

(*j*) Scott *v.* Stansfield, L. R., 3 Ex. 220.

(*k*) Lewis *v.* Levy, 27 Law J., Q. B. 289. M'Gregor *v.* Thwaites, 3 B. & C. 24; *post*, ch. 17, s. 1.

(*l*) Ferguson *v.* Kinnoul (Earl of), 9 Cl. & Fin. 290. And see Pedley *v.* Davis, *post*, ch. 15, s. 1. When duties which are purely ministerial are cast upon officers whose chief functions are judicial, and the ministerial duty is violated, the officer, although for most purposes a judge, is still civilly responsible for such misconduct. Rochester White Lead Co. *v.* City of Rochester, 3 N. Y. 463. Wilson *v.* Mayor of New York, 1 Denio, 599. Stone *v.* Augusta, 46 Me. 127. Taylor *v.* Doremus, 1 Harr. 476. Stone *v.* Graves, 8 Mo. 148.

authority to inquire, or his proceedings will be extra-judicial, and he will be responsible for the injurious consequences that result from them to others. The particulars of a plaintiff's claim, for example, in the county court, served on the defendant with the county court summons, must disclose some matter of complaint within the jurisdiction of the court; and if they disclose a cause of action over which the court has no jurisdiction, the judge cannot alter the particulars by inserting therein a new cause of action, and proceeding to hear it, for the defendant has never been summoned to answer such new cause of action, and the judge has consequently no power to take cognizance of it, if the defendant objects to his so doing(*m*).

885 *Disqualification of judges on account of interest.*—In accordance with the maxim, "nemo debet esse judex in propriâ suâ causâ," it has been held, that whenever it appears that the judge is a party to the suit, the judgment is erroneous(*n*). If, therefore, he has any private or pecuniary interest in the subject-matter of the suit, he cannot adjudicate upon it(*o*). Such interest, however, must be direct and certain, and not merely remote or contingent(*oo*). Where, therefore, at the time of taking an inquisition before the sheriff in a railway compensation case there was in existence an agreement not yet carried out between the company, which was taking the land, and another railway company, for their amalgamation, and the sheriff was a shareholder in the last-mentioned company, it was held that the proceedings were valid(*p*).

886 *Exemption of judges from actions where they have a prima facie jurisdiction, and no objection is taken to their jurisdiction.*—A judge of a court

(*m*) Hopper, *In re*, 32 Law J., Q. B. 104.

(*n*) London (City of) *v.* Wood, 12 Mod. 688. It is doubtful whether this rule applies to cases in which no other judge could try and determine the cause. See Heydenfeldt *v.* Towns, 27 Ala. 423.

(*o*) Dimes *v.* Grand Junction Canal Co., 3 H. L. C. 759. Reg. *v.* Aberdeen Canal Co., 14 Q. B. 866. Kemp *v.* Rose, *supra*. See *post*, "Interested Justices." Stockwell *v.* White Lake, 22 Mich. 341. Ochus *v.* Sheldon, 12 Fla. 138. Schroder *v.* Ehlers, 2 Vroom (N. J.), 44.

(*oo*) Trustees Int. Imp. Fund *v.* Bailey, 10 Fla. 213. Peck *v.* Freeholders of Essex, 1 Spencer, 457. It must also be a personal right or privilege in some way depending on the result of the cause, and not a mere bias, partiality or prejudice. Taylor *v.* Williams, 26 Texas, 583.

(*p*) Reg. *v.* Manchester & Sheffield Rail., L. R., 2 Q. B. 336. The case was decided under s. 39 of the Lands Clauses Act, but it was considered that the words "interested in the matter in dispute," used in that section were merely declaratory of the common law. See Reg. *v.* Rand, *post*, ch. 15, s. 1. But where two of the judges of the court appointing commissioners to appraise land to be appropriated for the use of a railroad company are stockholders in the corporation, their interest is such as to invalidate the report of the commissioners. Gregory *v.* C. C. & C. R. R. Co., 4 Ohio (N. S.), 675. In most if not in all of the States of the Union a judge who is within a certain degree of consanguinity or relationship to a party to an action, or who has been employed therein in a professional capacity, is disqualified from trying and determining the action. What precise degree of consanguinity will operate as a disqualification is fixed by statutes of the several States.

of record in England with limited jurisdiction is not responsible in damages for the consequences of his acts and proceedings in respect of matters over which he had no jurisdiction, if he had a *prima facie* jurisdiction in the matter, and had not the knowledge or means of knowledge, of which he ought to have availed himself, of his want of jurisdiction. Thus it has been held, that if one be arrested by a process out of an inferior court for a cause of action which did not arise within its jurisdiction, the party arrested may well maintain an action against the plaintiff who levied the plaint, and should be intended to know where the cause of action arose; but not against the judge or officer who had entered the plaint, or the officer who had executed it, for when it was impossible for them to know that the cause of action did not arise within their jurisdiction, it would not be agreeable to any rules of justice to make them liable to an action; but the proper and just remedy was against the plaintiff(*q*). It has accordingly been held, that the judge of a court of record in a borough is not responsible as a trespasser for the imprisonment of a defendant where he had no means of knowing except through the plaintiff or defendant, and did not know, that the cause of action arose without the limits of the borough(*r*).

Where the facts of the case before a county court judge, although subsequently found to be false, were such as, if true, would have given the judge jurisdiction, the judge was held not to be responsible for his judgment and order in the matter; but where the facts showed that he had no jurisdiction, and the judge mistook the law as applied to those facts, and wrongfully ordered a party to be committed, it was held that he was responsible in damages for the imprisonment(*s*).

If an action is brought in a court of limited jurisdiction, and the defendant pleads to the jurisdiction, the court must decide whether they have jurisdiction or not; and if they decide that they have jurisdiction in a case where they clearly have no pretence for it, and give judgment against the defendant, all the members of the court present, and taking part in the judgment, may render themselves liable to an action(*t*).

A county court judge is not ousted of his jurisdiction by a notice of a *bonâ fide* claim of title in those cases to which his jurisdiction to try

(*q*) Ollet *v.* Bessey, 2 W. Jones, 214.
(*r*) Gwynn *v.* Poole, Lutw. App. 1566. Calder *v.* Halkett, 3 Moore, P. C. C. 77. Taafe *v.* Downes, ib. 26, n.
(*s*) Houlden *v.* Smith, 14 Q. B. 852.
(*t*) Wingate *v.* Waite, 6 M. & W. 746.

cases of title does not extend(*u*). It is his duty to inquire into the claim, and determine whether there really is a question of title involved in the issue before him. If, in a controversy between landlord and tenant, it appears that the tenant has been actually turned out of possession by a third party, claiming by title paramount, a question of title arises; but this is not the case if it appears that the tenant voluntarily gave up possession to such third party(*x*).

887 *Orders of commitment by county court judges.*—If a county court judge makes an illegal order of commitment in respect of a matter over which he has jurisdiction, he is not himself responsible for his erroneous judgment(*y*). But if he had no jurisdiction in the matter, and the order or warrant of commitment is put in force, he is liable to an action for false imprisonment, if the facts depriving him of his jurisdiction were brought to his knowledge.

888 *Commitments for contempt(z).*—A court of record has power to punish, by commitment for contempt, a libel upon the court, published when the court is not sitting as well as when it is sitting, and the question whether the particular publication be libelous or contemptuous is a question for the court which commits. Any publication tending to influence the result of a pending suit, or to prejudice the minds of the public with regard to it, is a contempt of court(*a*), *e.g.*, the publication of a petition for winding up a public company before the hearing(*b*).

When the committal is by way of punishment, it ought to be certain as a sentence, and the term of imprisonment should be specified(*c*). The court cannot for contempt suspend a barrister from practising, if the contempt be not in his character as barrister, but as suitor, for the proper punishment for contempt of court is fine and imprisonment(*d*). The court cannot delegate to a single judge the power of issuing a warrant for the apprehension and committal of the person in con-

(*u*) *i.e.*, where the rent or the value of the land, etc., in dispute exceeds 20*l.* 30 & 31 Vict. c. 142. ss. 11, 12.

(*x*) Emery *v.* Barnett, 4 C. B., N. S. 431; 27 Law J., C. P. 216.

(*y*) Hammond *v.* Howell, 1 Mod. 184.

(*z*) See *post.* ch. 15. s. 1. As to commitments by legislative assemblies, see Doyle *v.* Falconer, L. R., 1 P. C. Ca. 328; The Speaker of the Legislative Assembly of Victoria *v.* Glass, L. R., 3 P. C. Ca. 560; Attorney-General of New South Wales *v.* Macpherson, L. R., 3 P. C. Ca. 268.

(*a*) Daw *v.* Eley, L. R., 7 Eq. Ca. 49. See Matter of Sturoc, 48 N. H. 428. *Ex parte* Hickey 4 Smedes & Marsh. 751; Respublica *v.* Oswald, 1 Dall. 319; Hollingsworth *v.* Duane, 1 Wall. 77, 102; Bronson's case, 12 Johns. 460; Respublica *v.* Passmore, 3 Yeates, 438.

(*b*) *Re* Cheltenham, etc., Carriage & Wagon Co., 38 Law J., Ch. 330; L. R., 8 Eq. Ca. 580 *Re* Hammel, 9 R. I. 248.

(*c*) Crawford's case, 13 Q. B. 629. Rex *v.* James. 5 B. & Ald. 894.

(*d*) *Re* Wallace, L. R., 1 P. C. Ca. 283. See *Re* Ramsay, L. R., 3 P. C. Ca. 427. See *Ex parte* Biggs, 64 N. C. 202; Matter of Moore, id. 396

tempt(e). A superior court may adjudge a man to be guilty of a contempt, and may imprison him for a certain time for such contempt, without setting forth on the face of the warrant the grounds upon which its adjudication proceeded(f). The County Courts Act, 9 & 10 Vict. c. 95, s. 113, gives the judge the power to commit for any insults wilfully offered to him or his officers, or for any wilful interruption of the proceedings of the court, or any other misbehavior in court; and it has been held that the judge has jurisdiction to decide conclusively whether any particular act did amount to an insult, or interruption, or misbehavior, and that it is unnecessary for a judge to say more in the warrant of commitment than that he had been wilfully insulted(g).

889 *Statutory forms of commitment by county court judges.*—The 19 and 20 Vict. c. 108, s. 59, enacts that every warrant of commitment issuing from a county court shall, on whatever day it may issue, bear date on the day on which the order for commitment was made, and shall continue in force for one year from such date, and no longer; but no order for commitment shall be drawn up or served; and that any warrant of commitment in respect of an unsatisfied judgment or order of a county court may be in the form, or to the effect, given in the schedule of the Act, and that all such warrants shall be deemed sufficient to justify proceedings under them, without any further statement of facts to show jurisdiction. The power of the county court judge to imprison judgment debtors has been considerably curtailed by the statute 32 & 33 Vict. c. 62. They are now, however, the judges in bankruptcies elsewhere than in London(h).

890 *Who are judges and judicial officers.*—The steward of a court-baron is a judicial officer, and cannot, therefore, be made responsible for the mistakes and irregularities of the bailiff's and ministerial officers of the court(i). So also was the sheriff when presiding in the county court as anciently constituted(j). The vice-chancellors of the Universities of Oxford and Cambridge are also judges of a court of record, and so are all persons who have power to fine and imprison(k). Wherever power is given to examine, hear, and punish, it is a judicial power, and they in whom it is reposed act as judges, and persons who

(e) Van Sandau v. Turner, 6 Q. B. 785.
(f) Fernandez, *Ex parte*, 10 C. B., N. S, 25; 30 Law J., C. P. 321.
(g) Levy v. Moylan, 10 C. B. 211.
(h) See 32 & 33 Vict. c. 71, ss. 77, 86. As to commitments by Commissioners of Bankrupts under the old law, and their liability for such, see Doswell v. Impey, 1 B. & C. 169.
(i) Holroyd v. Breare, 2 B. & Ald. 473.
(j) Tunno v. Morris, 2 C. M. & R. 298.
(k) Kemp v. Neville, 31 Law J., C. P. 158.

are made judges shall not be liable to have their judgments examined in actions brought against them(*l*).

891 *Delegation of judicial functions.*—Judicial functions cannot be delegated(*ll*), and if it has been the practice of a particular court to delegate to its clerk the performance of judicial acts, the practice is illegal, and the clerk who thus takes upon himself the office of judge is responsible for the orders he gives. If he takes upon himself to issue a warrant, without the order or direction of the judge, he is liable for the trespasses occasioned by its execution. Where commissioners of a court for the recovery of small debts were empowered by statute to order payment of judgment debts by instalments, and, in case of default in payment of the instalments, the commissioners present in court, at the instance of the plaintiff, and *upon due proof of the default*, were empowered to award execution against the judgment debtor, with such costs as to them should seem just, and it was shown to be the practice of the court for the commissioners, at the time they gave judgment for the plaintiff, to direct the debt to be paid by monthly instalments or execution to issue, it was held that the commissioners had no power to make such a practice or such an order at the time of the judgment, because, if made then prospectively, it dispensed with that proof of non-payment which the statute required, and with the exercise of any discretion on their part as to the execution or further costs; that the direction, therefore, for issuing execution, engrafted on the original judgment, and made part of it, was not merely irregular, but a nullity; that the clerk had issued the warrant without authority, and was consequently liable for the imprisonment occasioned by its execution(*m*).

892 *Removal of the proceedings of inferior courts for revision by a superior tribunal.*—The remedy by certiorari is available in all cases to remove the judgments, orders, and proceedings of courts of inferior jurisdiction, for the purpose of being examined by the Court of Queen's Bench, and quashed on the ground of want of jurisdiction or excess of jurisdiction, although the writ of certiorari is expressly taken away by statute. If it distinctly appears from the proceedings of the inferior court that the court has taken upon itself to decide on a matter over which it had no jurisdiction, the statutory prohibition of a certiorari does not apply, and the inherent jurisdiction of the Court of Queen's

(*l*) Groenvelt *v.* Burwell, 1 Ld. Raym. 467.
(*ll*) State *v.* Jefferson, 66 N. C. 309.
(*m*) Andrews *v.* Marris, 1 Q. B. 3. Whitelegg *v.* Richards, 2 B. & C. 45.

Bench is not restrained(*n*). And if there is nothing on the record to show that there was any excess of jurisdiction, the fact may, nevertheless, be established by affidavits(*o*). A bill of certiorari may also be filed in a court of equity, to remove a cause from an inferior court to the Court of Chancery, where it appears that the inferior court is acting without jurisdiction(*p*).

The writ of certiorari is, also, not taken away by statutory prohibition, when it is moved for on behalf of the crown. Thus the words in the County Courts Act, 9 & 10 Vict. c. 95, s. 90, enacting "that no plaint entered in any court holden under that Act shall be removed or removable from the said court into any of Her Majesty's superior courts of record by any writ or process, unless the debt or damage claimed shall exceed 5*l.*," does not take away the prerogative right of the crown to remove into the Court of Exchequer causes affecting the crown revenue. Therefore, where an officer of the crown distrained some of the sheep of the plaintiff damage feasant in a royal forest, and the plaintiff sought to recover in the county court 1*l.* damages from the officer for an illegal distress, the cause was removed into the superior court, notwithstanding the statutory prohibition(*q*).

The validity of a commitment by a judge of an inferior court may be tested by *habeas corpus*(*r*).

893 *Proceedings against county court judges to compel them to act in particular cases.*—The 19 & 20 Vict. c. 108, s. 43, enacts that no writ of mandamus shall henceforth issue to a judge or an officer of the county court for refusing to do any act relating to the duties of his office; but any party requiring such act to be done may apply to any superior court or judge thereof, upon an affidavit of the facts, for a rule or summons calling upon such judge or officer, and also the party to be affected by the act, to show cause why such act should not be done; and if, after the service of such rule or summons, good cause shall not be shown, the superior court or judge thereof may, by rule or order, direct the act to be done, and the judge or officer of the county court, upon being served with such rule or order, shall obey the same, on pain of attachment; and in any event the superior court, or the judge thereof, may make such order with respect to costs (*i.e.*, the costs of the

(*n*) Reg. *v.* South Wales Rail. Co., 13 Q. B. 993.
(*o*) *Re* Penny, 7 Ell. & Bl. 660; 26 Law J., Q. B. 225. Reg. *v.* Manch., etc., Rail. Co., 8 Ad. & E. 417.
(*p*) Tracy *v.* Open Stock Exchange, L. R., 11 Eq. Ca. 556.
(*q*) Mountjoy *v.* Wood, 1 H. & N. 58.
(*r*) Boyce, *In re*, 28 Law J., Q. B. 393.

application for the rule, not the costs in the county court(*s*)) as to such court or judge shall seem fit(*t*).

894 *Proceedings of courts-martial.*—Where the civil rights of a person in the military service are affected by the judgment or sentence of a military tribunal, if that military tribunal is exceeding its jurisdiction, or is acting without jurisdiction, the Court of Queen's Bench will interfere to protect the civil rights of the individual; but where the military status of the applicant only is concerned, the court has no jurisdiction in the matter, as that status is a matter depending entirely upon the will and pleasure of the crown(*u*).

SECTION II.

OF THE DUTIES AND RESPONSIBILITIES OF MINISTERIAL OFFICERS OF COURTS OF JUSTICE.

895 *Illegal assumption of the judicial office by ministerial officers.*—As judicial functions cannot be delegated (*ante*, p. 641), it follows that if the mere ministerial officer of the court takes upon himself the responsibility of issuing orders purporting on the face of them to be the orders of the court, but which are issued without its authority, and which are consequently in form only and not in fact the orders of the court, the officer so misconducting himself is responsible for all trespasses that may be committed in carrying into effect the orders so issued. But if the order has been made in a cause in court over which the judge has a general jurisdiction, the mere ministerial officer who receives the warrant or order from the clerk to execute, and has no knowledge that it was issued without the authority of the court, is not responsible for things done under it(*x*), and the clerk of the court, so long as he confines himself to the mere ministerial duties of his office, and does not take upon himself the exercise of the office of judge, is not responsible for things done under the orders that are signed and issued by him in the discharge of the duties of his office, unless there is a total absence of jurisdiction on the part of the judge(*y*).

(*s*) Churchward *v.* Coleman, L. R., 2 Q. B. 18. But see Whitehead *v.* Procter, 3 H. & N. 533.
(*t*) Fulber, *Ex parte*, 27 Law J., Exch. 3.
(*u*) Mansergh, *In re*, 30 Law J., Q. B. 296. See *ante*, p. 751.
(*x*) Andrews *v.* Marris, 1 Q. B. 3.
(*y*) Dews *v.* Riley, 11 C. B. 434.

896 *Neglect of duty by ministerial officers of courts of justice.*—Every ministerial officer of a court of justice is liable to an action for neglecting the duties of his office. Thus, an action lies against the chief clerk of a court for not entering a judgment on the roll when it is his duty so to do(*z*). An action also lies against the clerk of the court at the suit of a judgment creditor for unlawfully, without the sanction or authority of the court, taking upon himself to issue an order, purporting to be the order of the court, for the discharge of the judgment debtor, whereby the plaintiff lost the fruits of his judgment. It is no part of the duty of the clerk of the county court to prepare notices of judgments or orders of court for the payment of money, and no action, therefore, lies against him for omitting to prepare such a notice, or for negligently preparing it, whereby a party was misled as to the times of payment of certain instalments ordered by the judge to be paid, and had his goods taken in execution(*a*).

897 *Duties and responsibilities of the sheriff and his officers—Execution of writs.*—It is the duty of the sheriff, as soon as a writ of execution has been lodged in his hands, to make careful and diligent inquiry concerning the execution debtor or his property, and to execute the writ without any unnecessary delay. If he refuses to execute a writ when he has the opportunity, and is required to do it, and nothing occurs to prevent him, he will be responsible in damages to the execution creditor for his negligence(*b*). On receiving a writ of *fi. fa.* he must endeavor to ascertain what goods the execution debtor possesses within his bailiwick and seize them(*c*), and sell them to the best advantage(*d*). If he sells goods for much less than they ought to have been sold for, or does not take due and proper care in selling to the best advantage, or if he seizes or sells goods of much greater value than would suffice to satisfy the execution, poundage, and expenses, he will be respon-

(*z*) Douglas *v.* Yallop, 2 Burr. 722. So if a clerk refuses to issue an execution to which the plaintiff is entitled, the latter may maintain an action against the clerk on his official bond. Gooch *v.* Gregory, 65 N. C. 142. Goodwin *v.* Glazer, 10 Cal. 333. And where the delay of a clerk to issue an execution results in the loss of the debt, as where the defendant becomes insolvent, the clerk is liable to the plaintiff for all that he has lost by reason of the non-feasance. State *v.* Merritt, 65 N. C. 558. So if by reason of the neglect of the clerk to copy the return of a sheriff upon a summons, the judgment is reversed on appeal and the plaintiff loses his debt, the clerk will be liable in an action for damages for such neglect. Clark *v.* Wilcox, 31 Tex. 322.

But a clerk will not be liable for not issuing an execution in the absence of a request by the plaintiff that the execution be issued, or of a statute commanding it. Badham *v.* Jones, 64 N C. 655.

(*a*) Robinson *v.* Gell, 12 C. B. 191.

(*b*) Mason *v.* Paynter, 1 Q. B. 981. Brown *v.* Jarvis, 1 M. & W. 704. See Paton *v.* Westervelt, 2 Duer, 362.

(*c*) See *post*, p. 788.

(*d*) Pitcher *v.* King, 5 Q. B. 767.

sible in damages to the party damnified(*e*). There is no duty or obligation on the part of the judgment creditor to give the sheriff any information or assistance to enable him to execute the writ(*f*).

The law has always held the sheriff strictly, and with much jealousy, to the performance of his duty in the execution of writs, both from the danger there is of fraud and collusion with defendants, and also because it is a disgrace to the crown and the administration of justice if the king's writ remain unexecuted, as appears by the statute of Westminster the 2nd, c. 39(*g*). The law is tender also of the liberties and interests of the subject, and requires the presence of the responsible officer to control the execution of the writ. If, therefore, an arrest is made under a *ca. sa.* by a bailiff to whom the warrant is not addressed, in the absence of the officer to whom it is addressed, the arrest is irregular, and the defendant will be entitled to be discharged out of custody, and may maintain an action for wrongful imprisonment against the bailiff and the sheriff, unless the court has imposed upon him terms prohibiting him from bringing an action(*h*). Where a gentleman, who had obtained a warrant directed to a sheriff's officer to arrest his debtor, struck out the officer's name and inserted his own in its stead, and the gentleman was shot by the debtor whilst he was endeavoring to arrest him, it was held to be no murder, as the arrest was illegal, not having been effected by the officer named in the warrant(*i*).

898 *Priority of writs of execution.*—The sheriff, as between himself and different execution creditors, is bound to execute that writ which is first delivered to him to be executed, and is responsible to the first creditor who so delivered his writ if he does not, unless the execution of the writ is countermanded; in which case the writ, whilst the countermand continues, must be considered as not delivered at all to be executed, because the sheriff cannot act upon it. If, after the sheriff has been desired to suspend the execution of a writ, he receives an order to execute it, this order will not relate back, so as to give the execution of the writ any priority over writs which have been placed in the hands of the sheriff during the period of the suspended execution. The countermand of the execution of the writ is equivalent to its withdrawal, and it is not until the sheriff receives notice of with-

(*e*) Gawler *v.* Chaplin, 2 Exch. 506. Mullet *v.* Challis, 16 Q. B. 239.
(*f*) Dyke *v.* Duke, 4 B. N. C. 203.
(*g*) Howden *v.* Standish, 6 C. B. 520.
(*h*) Rhodes *v.* Hull, 26 Law J., Exch. 265. Gregory *v.* Cotterell, 5 Ell. & Bl. 571.
(*i*) Kenyon, C.J. Housin *v.* Barrow, 6 T. R. 123.

drawal of the countermand, and an order to proceed, that the writ is considered to have been again delivered to him to be executed(*k*).

Where goods have been seized under a former writ, founded on a judgment fraudulent against a creditor seeking to enforce a subsequent execution, and such goods remain in the hands of the sheriff, or are capable of being seized, the sheriff is bound to seize and sell the goods under the subsequent execution(*l*).

899 *Trespasses by the sheriff and his officers.*—The high-sheriff may be responsible for the acts of the under-sheriff in the execution of the duties of his office, as he is the general officer of the sheriff; but the bailiff is not the general officer of the sheriff. The bailiff gives a bond to the sheriff to execute such warrants as shall be directed to him, and when a warrant is granted him he becomes the special officer of the sheriff for the execution of the particular warrant, and the sheriff is responsible for what he does in the execution thereof, but he is not responsible when the act done by the officer is not done in the execution of the warrant(*m*). The liability of the sheriff, in case of mistake or misconduct on the part of his officer, is confined to cases where there is a misdoing of something which the sheriff commands him to do. If the sheriff is sued for a misfeasance of the officer, it is no answer for him to say that his command was not obeyed: he is still liable, provided the thing done be something which, by the command, or under the authority of the sheriff, the officer was bound to do(*n*). If a sheriff acting under a *fi. fa.* issues his warrant to his officer, directing him to levy a certain sum on the goods and chattels of the debtor in the usual form, and the officer arrests the debtor instead of levying on the goods, the sheriff will be responsible in damages for the mistake, although the sheriff never directed or authorized him to make the arrest(*o*), the case of a sheriff differing in this respect from the liability of an ordinary principal for the acts of an agent who does not pursue the authority committed to him.

But if the officer derives his authority for what he does from some third party, and not from the sheriff(*p*), or if he is not acting in the execution of any process directed to him by the sheriff to be executed, the sheriff is no party to his acts, and is not responsible for what he

(*k*) Hunt *v.* Hooper, 12 M. & W. 672.
(*l*) Imray *v.* Magnay, 11 M. & W. 275.
(*m*) Littledale, J., Crowder *v.* Long, 8 B. & C. 605. Drake *v.* Sykes, 7 T. R. 116.
(*n*) Smith *v.* Pritchard, 8 C. B. 588.
(*o*) Smart *v.* Hutton, 8 Ad. & E. 568, n. Raphael *v.* Goodman, ib. 565. Gregory *v.* Cotterell, 5 Ell. & Bl. 586; 25 Law J., Q. B. 38.
(*p*) Cook *v.* Palmer, 6 B. & C. 742.

does. Thus, if an execution debtor arrested under a *ca. sa.* pays the debt and costs to the sheriff's officer to obtain his discharge, and the sheriff's officer fails to pay over the money to the execution creditor, in consequence whereof the debtor is a second time arrested under a fresh writ upon the same judgment, the sheriff is not liable to the debtor for the default of his officer in not paying over the money, as it is no part of the duty of the sheriff or his officer to receive the money. Such a transaction is in the nature of a private arrangement between the debtor and the officer, and the debtor must resort to the officer, who is responsible to him for the non-payment of the money, like any other person who has received a sum of money to be paid to another, and has made default in so doing(*q*).

900 *Execution of writs by special bailiffs.*—If the sheriff, at the request of the person suing out the writ, or his attorney, appoints a special bailiff for the execution of it, the sheriff is not then liable for the acts of the officer so appointed(*r*). When, however, the execution of the writ is not expressly taken out of the hands of the sheriff, if there is a mere request that a particular officer may be employed in the execution of it, this does not constitute that officer a special bailiff of the person making the request(*s*). So if the debtor interfere with the officer, although he will thus relieve the sheriff from responsibility as to those matters in which he has interfered, the sheriff will not therefore be relieved from responsibility as to matters in which the debtor has not interfered(*t*).

901 *Trespasses in dwelling-houses by sheriffs and their officers under color of the execution of legal process.*—If a sheriff by lifting the latch of the outer door of a dwelling-house, or opening the outer door in the way in which it is ordinarily opened by persons going into the house, enters the house of the execution debtor himself for the purpose of arresting him, or taking his goods, he is justified, if he has reasonable ground to believe that he is there, or that his goods are there; but if he enters the house of a stranger to make the arrest or the seizure, he is justified only in the event of his finding the execution debtor or his goods in the house(*u*). If it turn out that the latter is not in the house, or had no property there, the sheriff is a trespasser(*x*), unless the house was entered in hot pursuit after an escape (*post*, p. 785). The house in

(*q*) Woods *v.* Finnis, 7 Exch. 373.
(*r*) Ford *v.* Leche, 6 Ad. & E. 706. Doe *v.* Trye, 7 Sc. 704; 5 B. N. C. 573.
(*s*) Alderson *v.* Davenport, 13 M. & W. 42. Corbet *v.* Brown, 6 Dowl. 794
(*t*) Wright *v.* Child, L. R., 1 Exch. 358.
(*u*) Morrish *v.* Murray, 13 M. & W. 57.
(*x*) Ratcliffe *v.* Burton, 3 B. & P. 229. Johnson *v.* Leigh, 6 Taunt. 245.

which the execution debtor resides, *i.e.*, where he sleeps, may be considered to be his own house, although he is not the proprietor thereof, but only a lodger or visitor. "I see no difference," observes Lord Loughborough, "between a house of which the execution debtor is solely possessed, and a house in which he resides by the consent of another(*y*).

902 *Of the breaking open the outer door of a dwelling-house in the execution of legal process.*—In *Semayne's case*(*z*) it was resolved—"1. That the house of every man is to him as his castle and fortress, as well for his defence against injury and violence as for his repose.

"2. That when any house is recovered by any real action, or by ejectment, the sheriff may break the house, and deliver the seizin or possession to the demandant or plaintiff, for the words of the writ are 'habere facias seisinam,' or 'possessionem;' and, after judgment, it is not the house in right and judgment of law of the tenant or defendant.

"3. That in all cases when the king is party, the sheriff, if the doors be not open, may break the party's house, either to arrest him or to do other execution of the king's process, if otherwise he cannot enter. But before he breaks it he ought to signify the cause of his coming, and to make request to open the doors.

"4. That in all cases when the door is open, the sheriff may enter the house and do execution, at the suit of any subject, either of the body or the goods; but that it is not lawful for the sheriff (after request made to open the door and denial made), at the suit of a common person, to break the defendant's house, if the door be not opened, to execute any process at the suit of any subject.

"5. That the house of any one is not a castle or privilege but for himself, and shall not extend to protect any person who flies to his house, or the goods of any other which are brought and conveyed into his house to prevent a lawful execution, and to escape the ordinary process of law; for the privilege of his house extends only to him and his family, and to his own proper goods, or to those which are lawfully and without fraud and covin there; and therefore, in such cases, after denial on request made, the sheriff may break the house"(*a*).

The principle that every man's house is his castle does not extend to a barn or outhouse, not connected with a dwelling-house. There-

(*y*) Sheers *v.* Brooks, 2 H. Bl. 122.
(*z*) 5 Co. 91.
(*a*) Semayne's case, 1 Smith's L. C., 6th ed., p. 93. See Jacobs *v.* Measurers, 13 Gray (Mass.), 74.

fore the sheriff may break open the door of a barn in order to levy an execution(*b*).

If the officer, after he has peaceably obtained entrance through the outer door, and before he can make an actual arrest, is forcibly expelled from the house, and the outer door fastened against him, he may then break open the outer door and make the arrest(*c*). And when he has once lawfully got inside the house, he is justified in breaking open the outer door to get out again, if the door is locked, and there is no one within who will open the door(*d*).

If the window of a house be open, or a pane of glass broken, and the bailiff put his hand in and touch one for whom he has a warrant, he is thereby his prisoner, and the bailiff may break open the door of the house to come at him(*e*), or break through the window(*f*). And if, after the officer has effected an arrest, the debtor breaks loose and escapes into a house, the sheriff, or his officer, may break open the house to retake him, whether the house be the debtor's own house or the house of a stranger, provided he has given notice of the object of his coming, and has demanded and been refused admission(*g*).

903 *What amounts to a breaking of the outer door.*—If the sheriff, or his officer, opens the outer door of a house by lifting the latch, or drawing back a sliding bar, in the ordinary way in which persons going into the house open the door, this is not a breaking of the door. "As to the passage," observes Pollock, C.B., "in Comyn's Digest, 'EXECUTION,' that the sheriff may not open a latch, there is no reference to any authority in support of it. The cases do not support that proposition"(*h*).

904 *Of the breaking open of inner doors in the execution of a writ.*—If the sheriff, or his officer, gains peaceable entrance at the outer door of a dwelling house, he may break open an inner door of the house, either to seize the person or the goods of the owner of the house, or of a lodger therein(*i*), and having entered at the open outer door of the house, he need not demand to have the inner doors opened to him before he breaks them, in order to take goods under a *fi. fa.*(*k*).

(*b*) Benton *v.* Browne, 1 Sid. 186. Fullam *v.* Stearns, 30 Vt. 443.
(*c*) Aga Kurboolle Mahomed, 4 Moore, P. C. C. 239.
(*d*) Pugh *v.* Griffith, 7 Ad. & E. 827.
(*e*) Anon., 7 Mod. 8. Sandon *v.* Jervis, E. B. & E. 935; 28 Law J., Exch. 156. See *ante*, p. 697.
(*f*) Lloyd *v.* Sandilands, 8 Taunt. 250.
(*g*) Anon., Lofft, 390.
(*h*) Ryan *v.* Shilcock, 7 Exch. 77; 21 Law J., Exch. 58.
(*i*) Lee *v.* Gansell, 1 Cowp. 1; Lofft, 374.
(*k*) Hutchison *v.* Birch, 4 Taunt. 618. Lloyd *v.* Sandilands, 2 Moore, 210.

Any resistance to the bailiff after he has once entered at the open outer door will be punishable, although the entry may have been obtained by fraud and deceit(*l*).

905 *Illegality of an arrest or seizure of goods effected through the medium of an act of trespass.*—If the original entry into a dwelling-house by a sheriff or his officers was unlawful and an act of trespass, their continuance in the house is unlawful, and they cannot avail themselves of an entry or possession unlawfully gained to execute a *ca. sa.*(*m*). If the sheriff, in making his entry, "has been guilty either of a breach of a positive statute, or of an offence against the common law, such violation of the law in making the entry causes the possession thereby obtained to be illegal"(*n*). And if advantage is taken of the unlawful entry to effect an arrest of a judgment debtor, the court will order the prisoner to be discharged(*o*).

To break and enter a man's house for the purpose of executing a *ca. sa.* "is really," observes Parke, B., "not an abuse of the authority of the writ, but it is executing the authority where the sheriff has none; like going out of the jurisdiction to execute the writ. The door being open is a condition precedent to executing the writ in the dwelling-house"(*p*). As regards the seizure of goods, however, after an unlawful breaking into the house, a different doctrine has prevailed, on the authority of the following case in the Year Book, 18 Edw. 4, 4a:—"Catesby comes to the bar, and asks whether a sheriff and his officers breaking into a dwelling-house to execute a *fi. fa.* do a wrong or not; the judges answer that the defendants may bring trespass against them, notwithstanding the *fi. fa.* for that will not excuse them for breaking the house, but 'del prisel des biens tantum.'" "This case," observes Coleridge, J., "is cited in *Semayne's case*(*q*), as establishing that if the sheriff breaks the dwelling-house by force of a *fi. fa.*, he is a trespasser by the breaking, and yet the execution which he then doth is good. But it may be doubted whether the judges meant anything more in the Year Book than to state generally what a *fi. fa.* authorized a sheriff to do; but assuming that they did, still the dictum there, and that in *Semayne's case*, are both purely extra-judicial"(*r*).

(*l*) Rex. v. Backhouse, Lofft, 61.
(*m*) Hooper v. Lane, 6 H. L. C. 535.
(*n*) Tindal, C.J., Newton v. Harland, 1 M. & Gr. 658.
(*o*) Hodgson v. Towning, 5 Dowl. 410.
(*p*) Kerbey v. Denby, 1 M. & W. 341.
(*q*) 5 Co. 92a, 92b.
(*r*) Hooper v. Lane, 12 H. L. C. 542.

906 *When the sheriff becomes a trespasser by remaining on premises an unreasonable time.*—The writ of *fi. fa.* authorizes the sheriff, who has entered upon premises for the purpose of making a levy under it, to remain there for such time as is reasonably necessary for the execution of the writ; but if he remains more than a reasonable time he abuses the legal authority conferred upon him by the Queen's writ and becomes a trespasser, and in the position of a man who has walked into another person's house without any authority (*ante*, p. 322). The reasonableness of the time is a question for the jury(*s*).

907 *Seizure of the goods of the wrong person.*—A sheriff or his officer seizing goods under a writ of execution is responsible in damages if he takes the goods of the wrong person. "If he takes the goods of a stranger, though the plaintiff assures him they are the defendant's goods, he is a trespasser; for he is obliged at his peril to take notice whose the goods are, and for that purpose may impanel a jury to inquire in whom the property in the goods is vested(*t*), or compel rival claimants to interplead and establish their title"(*u*). Where, therefore, two persons, being father and son, both had the same name of baptism and surname, and both resided in the same house, and an action was brought against the son, who suffered judgment by default, and a writ of execution was issued against him, under which the sheriff, by mistake, took the goods of the father, it was held that the sheriff was responsible for the consequences of his mistake(*x*).

The sheriff has no right to seize the goods of a stranger in the possession of the execution debtor as the ostensible owner(*y*). If a woman, having furniture of her own, cohabits with the execution debtor, and assumes his name, and gives herself out as his wife, and permits him to appear to be the owner of her furniture, this does not give the sheriff any right to seize it under an execution against him(*z*). And if the man and woman have actually gone through the form of marriage, and are supposed to be man and wife, and the goods have been seized and sold by the sheriff, as the goods of the husband, without any notice or objection, and it afterwards transpires that the marriage was void, and that the goods belonged to the supposed wife before the celebration of the void marriage, the sheriff will be responsible to her

(*s*) Ash *v.* Dawnay, 8 Exch. 243. Playfair *v.* Musgrove, 14 M. & W. 239.

(*t*) Bac. Abr. EXECUTION, N. 5. Roberts *v.* Thomas, 6 T. R. 88. Saunderson *v.* Baker, 3 Wils. 309. See Markley *v.* Rand, 12 Cal. 275.

(*u*) *Post*, s. 3. INTERPLEADER.

(*x*) Jarmain *v.* Hooper, 6 M. & Gr. 847; 7 Sc. N. R. 679.

(*y*) Dawson *v.* Wood, 3 Taunt. 260. Caldwell *v.* Arnold, 8 Minn. 265.

(*z*) Edwards *v.* Bridges, 2 Stark. 396.

in damages for the unlawful seizure(*a*). The acquiescence of the woman was held to be of no moment, the execution being a proceeding *in invitum*, she having no power to resist, and not having discovered the error.

But where the woman takes an active part in misleading the sheriff, and asserts that she is the wife of the execution debtor, knowing the assertion to be untrue, she is then herself the cause of the injury of which she complains, and is estopped from disputing the accuracy of her representation(*b*). And if the evidence shows that she had given the property to the man with whom she cohabited, and had made him the owner of it, the sheriff will then have a right to seize it(*c*).

As one man's goods cannot be seized by the sheriff to pay another man's debts, it follows that the goods of a testator in the hands of an executor cannot be seized under an execution against the executor to satisfy a judgment debt due from the executor himself in his own right(*d*); but if a devastavit has been committed by the executor, and the goods have been converted to his own use, the executor cannot take advantage of his own wrong, and justify his own misconduct, by saying that the goods are not his, but his testator's(*e*).

An illegal seizure of goods under void process does not prevent the sheriff from afterwards executing a legal warrant. The subsequent valid seizure is in nowise vitiated by the previous trespass, but a different rule prevails with respect to an illegal arrest(*f*).

It is not sufficient for a sheriff to enter a house with a writ of *fi. fa.* in his hands, and to demand the debt and costs, together with the expenses of the levying. He must do some overt act to execute the writ(*g*). But he need not actually seize anything. It is sufficient if he states to the persons left in charge of the property that he seizes everything there, and that nothing must be removed(*h*). And when he has thus taken possession of the goods, his officer shall continue in possession, in order to sustain the seizure against others afterwards coming under legal authority to seize the same goods(*i*). If he

(*a*) Glasspoole *v.* Young, 9 B. & C. 701.

(*b*) Langford *v.* Foot, 2 M. & Sc. 349.

(*c*) Edwards *v.* Farebrother, 2 M. & P. 293. As to the seizure of goods let to hire to the execution debtor, see Tancred *v.* Allgood, *post*, 794.

(*d*) Farr *v.* Newman, 4 T. R. 621. Gaskell *v.* Marshall, 1 M. & Rob. 132. Fenwick *v.* Laycock, 2 Q. B. 110.

(*e*) Quick *v.* Staines, 1 B. & P. 295.

(*f*) Percival *v.* Stamp, 9 Exch. 171. Hooper *v.* Lane, 6 H. L. C. 443.

(*g*) Nash *v.* Dickenson, L. R., 2 C. P. 252.

(*h*) Gladstone *v.* Padwick, L. R., 6 Exch. 203.

(*i*) Blades *v.* Arundel, 1 M. & S. 711. Ackland *v.* Paynter, 8 Pr. 95. As to the withdrawal of the sheriff under an interpleader order, see Darby *v.* Waterlow, *infra*.

give up possession without a lawful excuse, he will be liable to an action(*j*).

908 *Seizure by sheriffs and their officers of privileged or protected goods.*—An action is not maintainable against a sheriff who has seized privileged or protected goods, in obedience to the commands of a writ, but the person injured must apply to the court for an order upon the sheriff to restore the goods. Thus, if the sheriff seizes the property of a person, who has obtained an order, from a court of competent jurisdiction, of protection from process, the remedy is by application to the court for an order upon the sheriff to withdraw, and not by action(*k*).

No writ of *fi. fa.* can be executed in any of the palaces belonging to the crown, which is either at that time the residence of the sovereign, or in which there is an intention, and present power, on the part of the crown, to resume such residence; but if, although in one sense a royal palace, it has, for many years, been put to uses practically inconsistent with the personal residence of the sovereign, the exemption will cease(*l*).

The Mercantile Law Amendment Act, 19 & 20 Vict. c. 97, s. 1, provides that the delivery of a writ of *fi. fa.* is not to affect any title to the goods seized acquired *bonâ fide* before the actual levy without notice(*m*). The provisions of the Companies Act, 1862, ss. 87 and 163, have been cited, *ante*, p. 649. The words "put in force," there used, mean the taking of possession by, not the delivery of the writ to, the sheriff. Where, therefore, the execution creditor placed the writ in the hands of the sheriff three hours before a petition for winding up the company was presented, but possession was not taken till three hours afterwards, all further proceedings under the writ were stayed(*n*). Under particular circumstances, however, *i.e.*, where the company have not acted fairly towards the judgment creditor, he will be allowed to complete his execution(*o*). Where the creditor takes possession *before* the winding up, the Court of Chancery will not, under the provisions of the 87th section, restrain him, as a general rule, from reaping the benefit of his diligence(*p*). And so, if the creditor would have been in possession but for the fact of the judgment debtor having prevented him by force(*q*).

(*j*) Darby *v.* Waterlow, L. R., 3 C. P. 453.
(*k*) Rideal *v.* Fort, 11 Exch. 847.
(*l*) Att.-Gen. *v.* Dakin, L. R., 2 Exch. 290; 3 Ib. 268; 4 Engl. & Ir. App. 338.
(*m*) See Hobson *v.* Thelluson, L. R., 2 Q. B. 642.
(*n*) *Re* London & Devon Biscuit Co., L. R., 12 Eq. Ca. 190.
(*o*) *Re* Bastow & Co., L. R., 4 Eq. Ca. 681.
(*p*) *Re* Great Ship Co., 10 Jur. N. S. 3. Plas-yn-Mhowys Mining Co., L. R., 4 Eq. Ca. 689.
(*q*) *Re* London Cotton Co., L. R., 3 Eq. Ca. 53.

By the 30 and 31 Vict. c. 127, s. 4, continued by 34 & 35 Vict. c. 95, no execution can be levied on the rolling stock or plant of a railway company up to the 1st of September, 1872, and the end of the then next session, if the line is open for public traffic(*r*). The 7th section of the first-mentioned Act provides, that after the filing of a scheme of arrangement between the company and its creditors, under s. 6, the Court of Chancery may restrain any action against the company on such terms as it thinks fit; and the 9th section provides, that after publication of a notice in the London Gazette, that the scheme has been filed, no execution, attachment, or other process against the property of the company shall be available without the leave of the court. Under these sections the court has only an interim power, between the filing and the enrolment of a scheme of arrangement, to allow an execution, but after the enrolment any creditor bound by the scheme would, it seems, be prevented from issuing execution(*s*).

909 *Power of the sheriff to compel rival claimants to interplead and establish their title.*—By 1 & 2 Wm. 4, c. 58, s. 6, reciting that difficulties arise in the execution of process against goods and chattels, by reason of claims made to such goods and chattels by persons not being the parties against whom the process has issued, whereby sheriffs and officers are exposed to actions, it is enacted, that "when any such claim shall be made to any goods or chattels taken, or intended to be taken, in execution, under any such process, or to the proceeds or value thereof," it shall be lawful for the court from which such process issued, upon application of the sheriff or officer, made before or after the return of such process, and before or after any action brought, to call before them, by rule of court, as well the party issuing the process as the party making such claim, and thereupon to exercise, for the adjustment of such claims, and the relief and protection of the sheriff or officer, any of the powers conferred by the statute, and to make such rules and decisions as shall appear to be just. And the 1 & 2 Vict. c. 45, s. 2, enables any single judge of the superior courts to exercise the powers and authorities for the relief and protection of the sheriff or other officer given by virtue of 1 & 2 Wm. 4, c. 58, s. 6. Among the powers contained in the last-named Act is the power of making rules and orders (s. 1), calling upon the claimant to appear and state the nature and particulars of his claim, and maintain or relinquish his claim, and to stay proceedings in actions, and to order

(*r*) See *Re* Cambrian Railways Company's Scheme, L. R., 3 Ch. App. 278.

(*s*) *Re* Potteries, Shrewsbury, & North Wales Rwy., L. R., 5 Ch. App. 67. Potteries, Shrewsbury, & North Wales Rwy. *v.* Minor, L. R., 6 Ch. App. 621

actions to be tried, and direct which of the parties are to be plaintiff or defendant in such actions.

These powers may be exercised, though the titles of the claimants have not a common origin, but are adverse to, and independent of, one another(*t*). But they do not apply to claims for rent, unless the landlord claims the goods themselves, or the proceeds of them, as being his property(*u*).

It is not necessary that the sheriff should have made an actual seizure of the goods in order to be entitled to the benefit of the statute. It is sufficient if he intends to seize the goods, having the writ or process in his possession(*v*).

The object of the Act is to give protection to the sheriff, whenever, by reason of claims to the property, he is in danger of actions by the execution creditor if he yields to the claim, or by the claimant if he executes the writ. But it is not intended to protect the sheriff, where the resistance is to the writ itself, *i.e.*, where the party in the cause objects to any execution on his own goods, for there the process itself, properly executed, would be the sheriff's defence(*w*); nor does it apply where there has been an unlawful breaking open of the outer door of a dwelling-house by the sheriff, in order to effect the seizure of the chattels, for this is a wrong quite independent of any question of ownership of the goods seized, and the court or a judge has no authority to stay proceedings in an action brought in respect thereof. The statute is altogether silent respecting such a subject-matter of complaint, and therefore affords the sheriff no protection in respect of it. "It is quite clear," observes Maule, J., "that an action for unlawfully breaking and entering a house in the execution of process is no more within the contemplation of this Act than an assault and battery of the party would be. It cannot be said that the damages in such an action are something as to which the sheriff doubts who is entitled to them. He is charged as a wrong-doer; there is nothing to interplead about; nobody but himself is interested in the result, or liable for the consequences"(*x*)

But when there has been no independent trespass, when the outer door of a dwelling has not been broken open, and the entry into the house would be lawful, and protected by the process, if the goods found

(*t*) 23 & 24 Vict. c. 126, s. 12.
(*u*) Bateman *v.* Farnsworth, 29 Law J., Exch. 365.
(*v*) Lea *v.* Rossi, 11 Exch. 13; 24 Law J., Exch. 280. Day *v.* Carr, 7 Exch. 886.
(*w*) Fenwick *v.* Laycock, 2 Q. B. 110.
(*x*) Hollier *v.* Laurie, 3 C. B. 342.

therein should turn out to be the goods of the execution debtor, the entry into the house cannot be separated from the seizure of the goods, but the whole cause of action may be stayed until the ownership of the goods has been determined by interpleader(*y*). If that is determined in favor of the sheriff, all further proceedings against him will be stayed; if it is decided against him, the action may be proceeded with for the recovery of damages for the trespass in the house as well as for the seizure of the goods(*z*).

If the execution creditor has personally interfered in making the seizure, and directed the movements of the sheriff (see *ante*, p. 594), so as to render himself liable to an action, the court or a judge has power to interfere for his protection, as well as for the protection of the sheriff, and to stay proceedings against him(*a*).

The court will not lend its assistance to the sheriff where there have been delays, irregularities, or sinister dealings on the part of his officers charged with the execution of the process. If a sheriff delays to make application for relief at the request, and for the interest, of one of the rival claimants, he places himself out of the protection of the statute(*b*). To enable him to have the benefit of the course open to him by the statute, it is essential that he should come promptly to the court, without exercising any discretion of his own upon the matters in controversy(*c*). But if, after he has seized but before he has sold, he receives notice of adjudication in bankruptcy, and subsequently an order of court is made directing him to make a return to the writ of *fi. fa.*, he may sell under the authority of such an order, and pay the money into court(*d*). There are some old cases in which a great degree of strictness was exercised in admitting the sheriff to the benefit of the Act, and in which protection was denied under circumstances in which it would now be conceded(*e*).

In an interpleader suit the execution creditor may claim property which the execution debtor has disabled himself from claiming, for an estoppel which would be binding against the execution debtor in a claim put forward by him, will not be binding upon the execution creditor or the sheriff, who are strangers to the acts of the execution debtor(*f*).

(*y*) Winter *v.* Bartholomew, 11 Exch. 711.
(*z*) Foster *v.* Pritchard, 2 H. & N. 151.
(*a*) Carpenter *v.* Pearce, 27 Law J., Exch. 143.
(*b*) Mutton *v.* Young, 4 C. B. 375.
(*c*) Crump *v.* Day, ib. 764. Tufton *v.* Harding, 29 Law J., Ch. 225.
(*d*) Child *v.* Mann, L. R., 3 Eq. Ca. 806. See *ante*, p. 427, 428.
(*e*) Holt *v.* Frost, 3 H. & N. 821; 28 Law J., Exch. 55.
(*f*) Richards *v.* Johnston, 4 H. & N. 664.

910 *Claims of landlords on sheriffs for rent in arrear.*—By 8 Anne, c. 14, s. 1, it is enacted that no goods and chattels upon lands or tenements leased for life or lives, term of years, at will, or otherwise, shall be liable to be taken by virtue of any execution, unless the party at whose suit the execution is sued out shall, before the removal of such goods from off the said premises, pay to the landlord or his bailiff all such sums as shall be due for rent at the time of the taking, not exceeding one year's arrears of such rent(*g*). If the rent of the premises on which the levy is to be made is in arrear, there are no goods out of which the sheriff is bound to levy, until the arrear, not exceeding one year's rent has been paid to the landlord. The sheriff is not called upon by law to advance the money to pay the rent, but such advance must be made by the execution creditor; and if he neglects to make it after notice of the rent being due, the sheriff cannot be called upon to seize and sell the goods, let their value be what it may(*h*). If a year's rent is in arrear, and the goods on the premises are not sufficient to satisfy a year's rent, the sheriff must withdraw(*i*), and he may be restrained by injunction from selling the landlord's fixtures(*j*).

If the landlord or his agent accepts an undertaking from the sheriff or his officer to pay the rent due, and consents to the removal of the goods, he waives the benefit of the statute, and cannot afterwards sue thereon. His remedy in such a case is upon the undertaking(*k*).

A trustee in whom the legal estate in reversion is vested may be the landlord within the meaning of the statute(*l*). To entitle the landlord to the year's rent, there must be an existing tenancy at an ascertained rent at the time(*m*), and the execution must not be an execution put in by, or at the instance of, the landlord himself(*n*). The statute does not extend to a ground-rent due to the superior landlord(*o*), nor to goods seized by the sheriff and conveyed by bill of sale to the execution creditor, but not removed from the demised premises, the landlord's right to distrain such goods not being taken away(*p*).

This right of the landlord to a year's rent is confined to executions

(*g*) Foster *v.* Cookson, 1 Q. B. 419.
(*h*) Cocker *v.* Musgrove, 9 Q. B. 234.
(*i*) Foster *v.* Hilton, 1 Dowl. 35.
(*j*) Richardson *v.* Ardley, 38 L. J., Ch. 506.
(*k*) Rotherey *v.* Wood, 3 Campb. 24.
(*l*) Colyer *v.* Speer, 4 Moore, 473.
(*m*) Hodgson *v.* Gascoigne, 5 B. & Ald. 88.
(*n*) Taylor *v.* Lanyon, 4 M. & P. 316; 6 Bing. 536. Lee *v.* Lopes, 15 East, 230.
(*o*) Bennet's case, 2 Str. 786.
(*p*) Smallman *v.* Pollard, 7 Sc. N. R. 911; 6 M. & Gr. 1001. White *v.* Binstead, 13 C. B. 304.

upon judgments(*q*) and private extents, and does not extend to prerogative process, such as an extent in chief, or an extent in aid(*r*).

911 *Sale by sheriff of goods taken in execution.*—It is the duty of the sheriff to sell goods seized under a *fi. fa.* within a reasonable time after the seizure; and if he fails to do so, an action is maintainable against him by the judgment creditor(*s*). If he sells more than sufficient to satisfy the judgment debt and costs, he will be responsible in damages to the execution debtor(*t*). In selling goods seized under a writ of execution, he can convey no better title to the goods than the execution debtor himself possessed at the time of the sale, and he does not, when he sells, profess to do more than that, and does not warrant the title to the purchaser(*u*). If the sheriff has sold goods which were in the possession of the execution debtor at the time of the sale as the ostensible owner, but which were in reality the goods of a plaintiff, who had let them to hire to such execution debtor, the sheriff is not liable to an action for the wrongful sale, unless it be proved that some actual damage has accrued therefrom to the plaintiff(*x*), and that he has been prevented by the act of the sheriff from recovering possession of his goods(*x*).

912 *Capture of the wrong person.*—If the sheriff's officer has, by mistake or through false information, arrested the wrong party under a *ca. sa.*, the sheriff is responsible for the mistake, unless the person arrested was himself instrumental in giving false information to the sheriff, or brought about his imprisonment by his own misrepresentation(*y*). And it does not lie in the sheriff's mouth to say that he arrested *A*, sued under the name of *B*, although *A* was in fact served with the writ of summons issued against *B*, upon which service the action had proceeded to judgment(*z*).

913 *Arrest of the right person under a wrong name.*—If there is no mistake as to the person of the debtor, if his identity is established, but there is a misnomer, either from the debtor's having himself given a wrong name, or from his having suffered judgment to be obtained against him in the wrong name, he will be deemed to be known as well by his assumed name as by his real name, and he will have no

(*q*) Brandling *v.* Barrington, 9 D. & R. 617.
(*r*) Rex *v.* Southerby, Bunb. 5.
(*s*) Jacobs *v.* Humphrey, 2 Cr. & M. 413. Bates *v.* Wingfield, 2 N. & M. 831.
(*t*) Batchelor *v.* Vyse, 4 M. & Sc. 552.
(*u*) Chapman *v.* Speller, 14 Q. B. 621.
(*x*) Tancred *v.* Allgood, 4 H. & N. 444; 28 Law J., Exch. 362.
(*y*) Davis *v.* Jenkins, *ante*, p. 6. Dunston *v.* Paterson, *ante*, p. 701; *post*, p. 801.
(*z*) Kelly *v.* Lawrence, 33 Law J., Exch. 197. See Mahan *v.* Green, 34 Vt. 69.

ground to object to the proceedings against him(*a*). If he has been sued by a wrong name, and suffers judgment to go against him without attempting to rectify the mistake, he cannot afterwards, when execution has been issued against him in the wrong name, contend that he is not the person whom the sheriff or his officer is directed to arrest(*b*). Whenever a defendant omits to plead a misnomer he may be taken in execution in the wrong name(*c*).

914 *Illegal arrest on Sundays.*—The 29 Car. 2, c. 7, s. 6, prohibits the service or execution on Sundays of any writ, process, warrant, order, judgment, or decree, except in cases of treason, felony, and breach of the peace(*d*), and the 9 Geo. 4, c. 31, s. 23, makes it a misdemeanor to arrest any clergymen upon any civil process while he is performing divine service(*e*).

915 *Incurability of a wrongful imprisonment—Arrest under one of several writs.*—Where an arrest has been made on a valid writ, the sheriff may detain the person arrested on any number of valid writs which he has at the time against such person, or which afterwards reach him; but if the sheriff makes the arrest on a forged or a feigned writ, or a writ which has never been sealed or stamped, and which is therefore invalid, this gives him no right to detain the party on any other valid writs which may be at that time in his hands, for the sheriff cannot avail himself of a custody brought about by illegal means to execute the other writs; and if the sheriff knew, or ought to have known, that the writ under which he arrests was void, and nevertheless makes the arrest, and so deprives himself of the power of executing other valid writs in his hands, he will be responsible for culpable negligence and breach of duty. If an arrest be made on a Sunday, or in a way not authorized by law, the sheriff cannot afterwards make that valid by detaining the person under a legal writ, but must first give him an opportunity of going at large, and then execute the legal writ. But that is not the case with regard to an execution against the goods(*f*). If, therefore, a first arrest be a false imprisonment by reason of the wrongful act of the sheriff himself or his officer, no sub-

(*a*) Price *v.* Harwood, 3 Campb. 108. Walker *v.* Willoughby, 6 Taunt. 530.

(*b*) Fisher *v.* Magnay, 6 Sc. N. R. 599; 5 M. & Gr. 779. Trull *v.* Howland, 10 Cush. (Mass.) 109.

(*c*) Crawford *v.* Satchwell, 2 Str. 1218.

(*d*) Wells *v.* Gurney, 8 B. &. 769. That the officer is not protected by his process for an arrest made on Sunday, see Pearce *v.* Atwood, 13 Mass. 324.

(*e*) Goddard *v.* Harris, 5 M. & P. 122; 7 Bing. 320.

(*f*) Eggington's case, 2 Ell. & Bl. 728. Percival *v.* Stamp, 9 Exch. 171. Hooper *v.* Lane, 27 Law J., Q. B. 75; 6 H. L. C. 497.

sequent conduct or act of his can legalize the continuance by him of that imprisonment(*g*).

916 *Arrest of privileged persons.*—In all cases of privilege, whether on the ground of the person being a member of the legislature(*h*), or having a duty to perform about the person of the Queen, or from any other cause, it has always been considered that the sheriff is justified if he obeys the Queen's writ, and that the privileged person must apply to the court for his discharge(*i*). The arrest by the sheriff under a writ from any of the Queen's courts, of a person privileged from arrest, by reason of his being in attendance as a witness, under the process of another court, does not form the ground of any action at law, but is only the subject of an application to the court, under whose authority the party has been compelled to appear as a witness, to discharge him from custody(*k*). If a person who has obtained an order of protection from a court of competent jurisdiction, or who is attending or returning from the court(*l*), is, nevertheless, arrested under a *ca. sa.*, he is entitled to be discharged, and thus obtains the benefit of his protection, but he has no claim for damages(*m*).

917 *Countermand of writs and warrants.*—Notice to the sheriff or his officer not to execute a *ca. sa.* will render both the bailiff and the sheriff responsible for a false imprisonment if the arrest is made after the receipt of the notice, provided the notice has been given by the plaintiff's attorney. If the officer receives notice from the attorney that the action is settled, or that the execution is withdrawn, that is a notice not to make the arrest(*n*). If a writ is left at the sheriff's office, with orders not to execute it, and the sheriff arrests under it, he is a wrong-doer: if it is to be returned *non est inventus*, it must lie, and the sheriff ought not to issue a warrant or arrest; but if the defendant is brought in, or chooses to come in and surrender, then the sheriff must arrest(*o*).

Under a writ of *fi. fa.*, which directs the sheriff to make a certain specified sum out of the goods and chattels of the defendant, and have the money at the return of the writ, the sheriff or his officer may

(*g*) Humphrey *v.* Mitchell, 5 Sc. 51.

(*h*) See Newcastle (Duke of) *v.* Morris, L. R., 4 Engl. & Ir. App. 661. See 34 & 35 Vict. c. 50, disqualifying bankrupt peers from sitting or voting in parliament. See s. 10.

(*i*) Alderson, B., Rideal *v.* Fort, 11 Exch. 852.

(*k*) Magnay *v.* Burt, 5 Q. B. 395. See Gilpin *v.* Cohen, L. R., 4 Exch. 131, as to the arrest of an accused person out on bail attending a police court.

(*l*) Chauvin *v.* Alexandre, 31 Law J., Q. B. 79.

(*m*) Yearsley *v.* Heane, 14 M. & W. 334.

(*n*) Futcher *v.* Hinder, 28 Law J., Exch. 28. Withers *v.* Parker, 4 H. & N. 534.

(*o*) Hooper *v.* Lane, 6 H. L. C. 522. Magnay *v.* Monger, 4 Q. B. 817.

receive the money in discharge of the execution, and withdraw the levy and liberate the defendant's goods on payment of the money; but under the writ of *ca. sa.*, which commands the sheriff to have the body of the debtor at the return of the writ to satisfy the plaintiff, and not the money to pay the debt, the sheriff has no right to receive the money and discharge the debtor, and substitute his own responsibility for that of the debtor, whose body the creditor has a right by law to keep until he has paid the debt. If, therefore, a sheriff's officer, charged with the execution of a writ of *ca. sa.*, allows the debtor, whom he has arrested under it to go at large on paying to him the sum mentioned in the writ, the sheriff will be responsible for an escape, for it is a neglect of duty on the part of the officer for which the sheriff is answerable(*p*).

918 *Liability of the sheriff for an escape.*—If a defendant, after having been taken in execution, is seen at large for ever so short a time, either before or after the return of the writ under which he has been arrested, the sheriff is responsible for an escape, as the writ commands him to take the defendant, and him safely keep, so that he may have him ready to satisfy the plaintiff(*q*). It is the duty of the sheriff to carry his prisoner to the county gaol after he has been arrested under a *ca. sa.*, and when once in gaol, the debtor must be kept there, and cannot be allowed to go out, though with a keeper or sheriff's officer. If, therefore, he is seen without the walls of the prison, the sheriff is responsible for an escape(*r*). If the sheriff, after he has arrested the debtor, receives from the latter the amount of the debt and costs, he will be responsible to the judgment creditor for an escape, if he sets his prisoner at large contrary to the exigency of the writ, before the judgment creditor has been satisfied his demand; for the duty of the sheriff is to pursue the direction of the writ, and be ready at the day, not with the money, but with the body of the debtor, unless the person himself who sued out the writ interfere and agree to the liberation of the

(*p*) Woods *v.* Finnis, 7 Exch. 372.

(*q*) Hawkins *v.* Plomer, 2 W. Bl. 1048. Moore *v.* Moore, 27 Law J., Ch. 887. Where a jailor permits a prisoner to take his meals in the part of the jail building occupied by the jailor's family, the jailor will be liable for a voluntary escape. Riley *v.* Whittiker, 49 N. H. 145. But see Burns *v.* Brian, 1 Speers, 131; Steere *v.* Field, 2 Mason, 486. In Wilkes *v.* Slaughter (3 Hawks, 211), it was held that if the sheriff give the keys of the prison to a prisoner it is an escape although the prisoner do not go without the walls. And see Steere *v.* Field, 2 Mason, 486. But in Currie *v.* Worthy (2 Jones' Law, N. C. 104), it was held, that merely permitting the door of a prison to remain open is not an escape if the debtor does not leave the prison.

Every liberty, given to a prisoner, which is not authorized by law is an escape. Colby *v.* Sampson, 5 Mass. 310. Lowry *v.* Barney, 2 Chip. 11.

(*r*) Williams *v.* Mostyn, 4 M. & W. 152.

prisoner upon receipt of the money which has been paid to the sheriff (*s*).

It is the duty of an officer going to make an arrest in the execution of legal process to choose his opportunity, and go with a force sufficient to repel opposition, and enable him to execute the process intrusted to him. If he fails to make an arrest, or if, having got the debtor into his custody, he fails to keep him for want of sufficient force, he will be responsible for a breach of duty(*t*). But if the prison take fire, or be broken open by the king's enemies of another kingdom, and the prisoner escapes, this will excuse the sheriff; but it is otherwise if the prison be broken open by traitors and rebels(*u*). And if the escape has been brought about by misrepresentation or misconduct on the part of the plaintiff, the latter has no cause of complaint against the sheriff(*x*).

By 8 & 9 Wm. 3, c. 27, s. 8, it is enacted, that if the keeper of any prison shall, after one day's notice in writing, given for that purpose, refuse to show any prisoner, committed in execution, to the creditor at whose suit he was committed, or to his attorney, every such refusal shall be adjudged an escape in law.

919 *Recapture upon fresh pursuit.*—The sheriff may retake the debtor upon fresh pursuit in any county without an escape-warrant, and plead the recapture in bar of an action for damages.

920 *Discharge of debtors taken in execution.*—By 15 & 16 Vict. c. 76, s. 126, it is enacted, as we have seen, that a written order, under the hand of the attorney in the cause, by whom any writ of *ca. sa.* has been issued, shall justify the sheriff, or person in whose custody the party may be, under such writ, in discharging such party, unless the person for whom such attorney professes to act shall have given written notice to the contrary. The sheriff is not bound to discharge a debtor from his custody immediately on receiving an order for his discharge. He is entitled to a reasonable time to search his office, to ascertain whether there are any other writs lodged against him(*y*).

(*s*) Slackford *v.* Austen, 14 East, 478. Woods *v.* Finnis, 7 Exch. 372.

(*t*) Nicholl *v.* Darley, 2 Y. & J. 403. Abbott *v.* Holland, 20 Geo. 845.

(*u*) Southcote's case, 4 Co. 84a. A sheriff is not liable for the escape of a prisoner held under void process. Tuttle *v.* Wilson, 24 Ill. 553. Hitchcock *v.* Baker, 2 Allen (Mass.), 431. Carpenter *v.* Willett, 31 N. Y. 90. Kidder *v.* Barker, 18 Vt. 454. Otherwise when the process was merely irregular. Howard *v.* Crawford, 15 Geo. 423. Spafford *v.* Goodell, 3 McLean, 97. Jones *v.* Cook, 1 Cow. 309. Nothing will excuse a sheriff for an escape of a debtor held under a *ca. sa.*, but the act of God or the public enemy. State *v.* Halford, 6 Rich. 58. Fairchild *v.* Case, 24 Wend. 381. Rainey *v.* Dunning, 2 Murph. 386. Patten *v.* Halstead, Coxe, 277.

(*x*) Hiscocks *v.* Jones, M. & M. 239; *post*, pp. 800-1. Dexter *v.* Adams, 2 Denio, 646. State *v.* Woods, 7 Mo. 536.

(*y*) Samuel *v.* Buller, 1 Exch. 440.

921 *Arrest of the person and seizure of goods under void or irregular process.*—In depriving a man of his liberty and seizing his goods, the sheriff and his officers act at their peril, so that if the process is feigned, forged, or simulated, and is not the process or order of the court, it is a mere nullity, and the sheriff can derive no protection from the piece of waste paper(*z*). But if the sheriff has acted under a genuine writ, issued from one of the superior courts, he and his officers acting under him are protected by it, although it be on the face of it irregular, as a capias against a peeress, or void in form, as a *ca. sa.* not made properly returnable; for the officers ought not to examine the judicial act of the court, nor exercise their judgment touching the validity of the process in point of law, but are bound to execute it, and are therefore protected by it(*a*). But the persons who have issued the void or irregular process are, as we have seen, responsible for all damage and injury done in the execution of it after the process has been set aside by the court or a judge unless it has been set aside for error(*b*), or on

(*z*) Hooper *v.* Lane, 10 Q. B. 561; 6 H. L. C. 443.

(*a*) Countess of Rutland's case, 6 Rep. 54a. Cotes *v.* Michill, 3 Lev. 20. See Hodson *v.* Millward, 3 Grant (Penn.), 406; Brainard *v.* Head, 15 La. An. 489; Cody *v.* Quinn, 6 Ired. 191. A writ regular upon its face, and issued by a court of competent jurisdiction, is a protection to the officer who serves it. Slomer *v.* People, 25 Ill. 70. Churchill *v.* Churchill, 12 Vt. 661. Luddington *v.* Peck, 2 Conn. 700. Waterbury *v.* Lockwood, 4 Day, 257. Kerlin *v.* Heacock, 3 Binn. 215. Warner *v.* Shedd, 10 Johns. 138. Taylor *v.* Alexander, 6 Ham. 144. McHugh *v.* Pundt, 1 Bailey, 441. Brown *v.* Wood, id. 457. Beaty *v.* Perkins, 6 Wend. 382. Fortner *v.* Flamagan, 3 Port. 257. Donahoe *v.* Shed, 8 Met. 326. Camp *v.* Moseley, 2 Fla. 171. Milburn *v.* Gilman, 11 Mo. 64. State *v.* McNally, 34 Me. 210. Wilton Manufacturing Co. *v.* Butler, 34 Me. 431. Averett *v.* Thompson, 15 Ala. 678. McDonald *v.* Wilkie, 13 Ill. 22. Billings *v.* Russell, 23 Penn. St. 189. Twitchell *v.* Shaw, 10 Cush. (Mass.) 46. Woods *v.* Davis, 34 N. H. 328. Young *v.* Wise, 7 Wis. 128. Neth *v.* Crofut, 30 Conn. 580. Bogert *v.* Phelps, 14 Wis. 88. McLean *v.* Cook, 23 Wis. 364. Hicks *v.* Dorn, 54 Barb. 172. Shaw *v.* Davis, 55 Barb. 389. Mangold *v.* Thorpe, 33 N. J. Law, (4 Vroom), 134.

And an officer is protected by process regular upon its face although at the time of executing it he knew of facts making it void for want of jurisdiction. People *v.* Warren, 5 Hill, 440. Brainard *v.* Head, 16 La. An. 489. Hart *v.* Dubois, 20 Wend. 236. But see McDonald *v.* Wilkie, 13 Ill. 22; Grace *v.* Mitchell, 31 Wis. 533.

Officers are not affected by irregularities in the process under which they act unless they are actual participators in the irregularity. Hart *v.* Dubois, 20 Wend. 236.

An officer making an arrest according to the process under which he acts, does not become a trespasser from the fact that the party arrested is privileged from arrest. Chase *v.* Fish, 4 Shep. 132. Carle *v.* Delesdernier, 1 Shep. 363. Woods *v.* Davis, 34 N. H. 328.

And an execution which is voidable only and not void, is a complete protection to the officer obeying its mandate. Cogburn *v.* Spence, 15 Ala. 549.

But where process is void upon its face as when issued by an officer not authorized by law to issue such process, the process is no justification to the officer executing it. Guerin *v.* Hunt, 8 Minn. 477.

A warrant issued by a justice of the peace without authority is no protection to the officer executing it. Stephens *v.* Wilkins, 6 Barr. 260.

And an execution issued by a magistrate against a defendant who has not been summoned before him is void and no protection to the officer who levies it. Tobin *v.* Addison, 2 Strobh. 3. In an action for false imprisonment an officer cannot justify an arrest under a void process. Gorton *v.* Frizzel, 20 Ill. 191.

(*b*) Williams *v.* Smith, *ante*, p. 720. See Kerr *v.* Mount, 28 N. Y. 659; Chapman *v.* Dyett, 11 Wend. 51; Smith *v.* Shaw, 12 Johns. 257; Hayden *v.* Shad, 11 Mass. 500; Merrit *v.* St. Paul,

the terms that no action shall be brought(*c*), and they will be responsible, in an action for false imprisonment, although the writ has not been set aside, if it has been issued in defiance of the express provisions of a statute(*d*).

Generally speaking, however, so long as the process has not been set aside, it is a protection to the attorney who has issued it, and to the client by whose commands it was issued(*e*); and though when it has been set aside it is no longer a justification to them, yet it always remains a justification to the sheriff and his officers, who had no option but to obey it(*f*). A writ of execution, therefore, may, at the same time, be both a good writ and a bad writ; that is to say, a writ set aside for irregularity may be good as to the sheriff and all persons acting under him, and bad as to the persons who sued it out(*g*).

If the sheriff, by force of a *fi. fa.*, sells goods, and afterwards the judgment is reversed by writ of error, the defendant shall not have restitution of his goods, but the value of them, for which they were sold; and there are two reasons for this: 1. If the sale of the sheriff, by force of a *fieri facias*, should be avoided by subsequent reversal of the judgment, there would be no buyer, and by consequence no execution done; 2. In the case of a *fieri facias*, the sheriff is compellable to make and levy the debt of the goods, etc., of the defendant, and therefore there is reason that it should stand(*h*).

922 *Exemption of sheriffs and others from responsibility when the injury has been brought about by the misrepresentation of the plaintiff.*—Every person who, by misrepresentation or misstatement, causes an officer charged with the execution of legal process to make a mistake and arrest the wrong person, or seize his goods, cannot complain of the wrong which he has himself occasioned. If by misrepresentation he causes himself to be arrested, he is the author of his own misfortune, and has no right to charge it upon the officer(*i*). If the plaintiff has represented himself to be the person against whom the process has

11 Minn. 228; Emery *v.* Hapgood, 7 Gray (Mass.), 55; Stetson *v.* Goldsmith, 30 Ala. 602; Cogburn *v.* Spence, 15 Ala. 549.

(*c*) Parsons *v.* Lloyd, 3 Wils. 341.

(*d*) Brooks *v.* Hodgkinson, 4 H. & N. 712. By the 32 & 33 Vict. c. 62, imprisonment for debt is abolished, with a few exceptions.

(*e*) Riddell *v.* Pakeman, 2 C. M. & R. 33. Blanchenay *v.* Burton, 4 Q. B. 707. Keniston *v.* Little, 10 Foster (N. H.), 318. Cogburn *v.* Spence, 15 Ala. 549.

(*f*) Jones *v.* Williams, 8 M. & W. 356. Best, J., in Woolley *v.* Clark, 5 B. & Ald. 746. Turner *v.* Felgate, 1 Lev. 95.

(*g*) Parke, B., in Jones *v.* Williams, 9 Dowl. 710. Doe *v.* Thorn, 1 M. & S. 427. Kerr *v.* Mount, 28 N. Y. 659. Chapman *v.* Dyatt, 11 Wend. 31.

(*h*) Hoe's case, 5 Co. 90b.

(*i*) Fisher *v.* Magnay, 5 M. & Gr. 778.

been issued, and is arrested in consequence of that representation, he is estopped, as we have seen (*ante*, p. 701), as regards that imprisonment, from denying that he was the right person; but, after he has given notice of the real state of facts to the officers, and given them a fair opportunity of inquiry, the detention would be unlawful(*j*).

923 *False returns to writs of execution.*—If the sheriff makes a false return to a writ of execution, he is responsible in damages to the execution creditor if any actual damage has resulted to him from the false return(*k*), but not otherwise; nor is he estopped by his false return from showing that there were in fact no goods of the execution debtor, on which he could levy, and so that no damage was suffered by the execution creditor(*l*). A return of *nulla bona* to a writ of *fi. fa.* means, that there are no goods applicable to the execution of the plaintiff's writ, not that there are no goods at all belonging to the execution debtor. If, therefore, the payment of prior claims, such as rent due to the landlord, or sums leviable under prior writs of execution, has exhausted the fruits of the levy, the sheriff has no goods out of which the damages can be levied, and a return of *nulla bona* is a good return(*m*). If the sheriff returns that he has seized certain goods and chattels, he ought to specify their value, and not return that their value is to him unknown(*n*). A reasonable degree of certainty in the language of the return is sufficient.

The sheriff would not be allowed, in an action against him for a false return, to defend himself by putting a construction on his own return which, although making it true in fact, would make it bad in law, when it admits of another construction which will make it good(*o*).

924 *Extortion by sheriffs and their officers.*—By 29 Eliz. c. 4, s. 1, it is enacted, that it shall not be lawful for any sheriff, under-sheriff, bailiff, etc., nor for any of their officers, deputies, etc., by reason or color of their offices, to receive or take for the serving or executing any extent or execution, more consideration or recompense than is by that Act limited and appointed, upon pain that every sheriff, under-sheriff, etc., their officers, etc., who shall directly or indirectly do the contrary, shall forfeit to the party grieved treble damages, and pay a penalty as therein mentioned, but the Act is not to extend to fees taken for executions

(*j*) Dunston *v.* Paterson, 2 C. B., N. S. 495; 26 Law J., C. P. 268.
(*k*) Wylie *v.* Birch, 4 Q. B. 566.
(*l*) Stimson *v.* Farnham, L. R., 7 Q. B. 175. See Lummis *v.* Kasson, 43 Barb. 378.
(*m*) Shattock *v.* Carden, 6 Exch. 725. Wintle *v.* Freeman, 11 Ad. & E. 547. Heeman *v.* Evans, 4 Sc. N. R. 2. Eighth National Bank of the City of New York *v.* Fitch, 49 N. Y 539.
(*n*) Barton *v.* Gill, 12 M. & W. 315.
(*o*) Reynolds *v.* Barford, 8 Sc. N. R. 232.

within any city or town corporate. The 7 Wm. 4 & 1 Vict. c. 55 further enacts, that it shall be lawful for sheriffs and their officers to receive such fees, and no more, as shall be allowed by the taxing officers of the courts of Westminster, under the sanction of the judges, and that any sheriff or officer receiving any fee or gratuity greater than is allowed, shall be guilty of a contempt of court, and punishable accordingly. And by 5 & 6 Vict. c. 98, s. 31, it is enacted, that no poundage shall be payable to sheriffs, bailiffs, and others, for taking the body of any person in execution(*p*); but there shall be payable to the sheriff, or other person having the return of writs, upon every such execution against the body, such fees only as shall be allowed to be taken under the 7 Wm. 4 and 1 Vict. c. 55. The sheriff still continues entitled to his poundage under the statute of Elizabeth, on an execution against the goods of the debtor, and also to any additional fee that may be allowed by the judges under 7 Wm. 4 and 1 Vict., and to no more. If his officer takes more the sheriff is guilty of extortion, and is liable to an action for treble damages(*q*).

925 *Duties and responsibilities of the high bailiff, bailiffs, and registrars, of the county court.*—By 9 & 10 Vict. c. 95, s. 33, the high bailiff of the county court is made responsible for all the acts and defaults of himself and the bailiffs appointed to assist him, in like manner as the sheriff of any county in England is responsible for the acts and defaults of himself and his officers. His liability is co-extensive with that of the sheriff(*r*), but he is not responsible for acts done by his bailiffs under color of some special power or authority supposed to be given to them under the County Courts Act, and not done under the authority or in execution of a warrant(*s*). The 29 & 30 Vict. c. 14, s. 11, provides for the appointment of the registrars of county courts to succeed to the duties and liabilities of high bailiffs, as vacancies shall occur.

926 *Liability of ministerial officers where the court has no jurisdiction and no authority to issue process.*—At the common law, a grievous responsibility was thrown upon ministerial officers of courts of inferior and limited jurisdiction, where the court had made orders and directed the issue of process, without jurisdiction in the matter, or where it had exceeded its jurisdiction. It was held, that when the court had not

(*p*) Hayley *v.* Racket, 5 M. & W. 620.
(*q*) Wrightup *v.* Greenacre, 10 Q. B. 12. Pilkington *v.* Cooke, 16 M. & W. 615. Woodgate *v.* Knatchbull, 2 T. R. 155.
(*r*) Burton *v.* Le Gros, 34 Law J., Q. B. 91.
(*s*) Smith *v.* Pritchard, 8 C. B. 568.

jurisdiction of the cause, then, the whole proceeding being *coram non judice*, actions would lie against the person who sued out, and against the officer or minister of the court who executed, the precept or process of the court, without any regard to such precept or process; "for the officer is not bound to obey him who is not judge of the cause any more than he is bound to obey the mere precept or order of a stranger, for the rule is, *judicum a non suo judice datum nullius est momenti*"(*t*). Therefore, where an officer acting under a warrant of a commissioner of bankrupts took and detained a person in custody under it, and it appeared that the commissioner had no jurisdiction to make the warrant, it was held that an action of trespass was maintainable against the officer(*u*). But the mischiefs arising from this unreasonable state of the law have to a great extent been remedied by the legislature(*v*).

927 *Duty of bailiffs of the county court to satisfy the landlord's claim for rent.*—By the 19 & 20 Vict. c. 108, s. 75, it is enacted, that the 8 Anne, c. 14 (*ante*, p. 793), shall not apply to goods taken in execution under the warrant of a county court; but the landlord may, within five days of the taking, or before the removal of the goods, make a claim in writing for rent, signed by himself or his agent, stating the amount of the rent in arrear, and the time for which it is due; and if such claim be made, the officer making the levy is to distrain for the rent so claimed, and the costs of the distress, but he is not to sell within five days, unless the goods be of a perishable nature, or upon the request in writing of the person whose goods have been taken. After the five days the bailiff is to sell such of the goods as will satisfy, first the costs of the sale, next the claim of the landlord, not exceeding the rent for four weeks where the tenement is let by the week, the rent for two terms of payment where the tenement is let for any other term less than a year, and the rent for one year in any other case, and lastly, the amount for which the warrant issued. If any replevin be

(*t*) Marshalsea case, 10 Co. 76a.

(*u*) Watson *v.* Bodell, 14 M. & W. 57. A clerk of the court under the laws of Minnesota has no authority to allow a writ of attachment; and a sheriff taking property under a writ so allowed has been held liable for trespass. Guerin *v.* Hunt, 8 Minn. 477.

That an officer is protected in acting under an execution fair and regular on its face, and containing nothing from which a want of jurisdiction in the justice issuing it could be inferred. See Young *v.* Wise, 7 Wis. 329; McDonald *v.* Wilkie, 13 Ill. 22.

That he is not protected by such process if he had notice of the want of jurisdiction of the officer issuing it. See McDonald *v.* Wilkie, 13 Ill. 22; Tefft *v.* Ashbaugh, 13 Ill. 602; Grace *v.* Mitchell, 31 Wis. 533; Sprague *v.* Birchard, 1 Wis. 457.

That he is protected notwithstanding such notice. See People *v.* Warren, 5 Hill, 440; Brainard *v.* Head, 15 La. An. 499.

That a warrant, void for want of jurisdiction, is no protection to the officer executing it. See Stephens *v.* Wilkins, 6 Barr. 260.

(*v*) *Post*, pp. 806–809, and ch. 15.

made, the bailiff is, notwithstanding, to sell such portion of the things taken as will satisfy the costs of the sale under the execution, and the amount for which the warrant issued. Any overplus of the sale or residue of the goods is to be returned to the defendant.

The county court bailiff cannot, under this statute, distrain the goods of a stranger on the demised premises for the purpose of satisfying the landlord's rent(*w*).

928 *Liabilities of gaolers.*—A gaoler who receives a prisoner under a warrant is not responsible in damages if the warrant has been irregularly issued; but if the wrong man has been arrested and brought to him, or the warrant is altogether void and a mere nullity, he will be responsible for the detention. Where the plaintiff had been delivered into the custody of the gaoler of a liberty under a good warrant for arrest, though the execution of it was illegal, inasmuch as the plaintiff, under a warrant to the bailiff of the liberty, had been arrested without the liberty, and afterwards carried into the liberty and delivered to the gaoler, it was held that an action could not be maintained against the gaoler, who was not bound to inquire whether the original arrest was tortious or not. "And it was said by the court, that if he had been informed of the tortious taking (without being of the covin or practising therein), he ought, nevertheless, to detain the prisoner, he being delivered to him with a good warrant of arrest, though the execution of it was illegal; for if such information had been false, and the gaoler had set the prisoner at large, he had been liable for an escape. And the plaintiff was not without remedy, for he had a good action against wrong-doers"(*x*). But if a sheriff's officer arrests the wrong man, and hands him over to a gaoler, there, as the arrest is altogether unjustifiable, and the warrant no protection, the gaoler who receives and detains the wrong man is responsible for the wrongful imprisonment, and cannot justify under the warrant, though he had no means of ascertaining the identity of the party brought to him with the person named in the warrant, and could not, consistently with his duty, have refused to receive and detain him(*y*). But if the person thus wrongfully arrested does not, when brought to the gaoler, complain of the wrongful arrest, or give the gaoler any means of ascertaining that he is not the person named in the warrant, nominal damages only would be recoverable.

(*w*) Beard *v.* Knight, 8 Ell. & Bl. 865; 27 Law J., Q. B. 359. Foulger *v.* Taylor, 5 H. & N. 202.
(*x*) Olliet *v.* Bessey, T. Jones, 214.
(*y*) Aaron *v.* Alexander, 3 Campb. 34. Griffin *v.* Coleman, 4 H. & N. 265; 28 Law J., Exch. 134; Bro. Abr. TRESPASS, pl. 133, 256, 265.

A gaoler is bound to discharge a prisoner, committed for contempt of court in not answering a bill in Chancery, at the end of thirty days, if the plaintiff in the cause does not bring the prisoner to the bar of the court within that period(*z*).

929 *Liability of the messenger of the Court of Bankruptcy.*—By the 31 & 32 Vict. c. 71, s. 99, power is given to the Court of Bankruptcy, where there is reason to believe that property of a bankrupt is concealed in any house or place not belonging to him, to grant a search-warrant to any constable or prescribed officer of the court, who may execute the same according to the tenor thereof, and may also break open any house, building, or room of the bankrupt where the bankrupt is supposed to be, or any building or receptacle of the bankrupt, where any of his property is supposed to be(*a*).

SECTION III.

OF ACTIONS AGAINST JUDGES, SHERIFFS, AND MINISTERIAL OFFICERS AND THEIR ASSISTANTS(*b*), AND PARTIES SETTING THEM IN MOTION.

930 *Actions against county court judges—Notice of action.*—Provision is made by the County Courts Act (19 & 20 Vict. c. 108, s. 19) for the prosecution of actions in the county court against the judges of the county court in the court of a district adjoining the district in which the defendant is judge. By 9 & 10 Vict. c. 95, s. 138, notice of action is required, as we have seen, to be given to all persons acting in execution of the County Courts Act. If, therefore, a county court judge, in making an order of commitment, acts under the *bonâ fide* belief that his duty as judge of the county court renders it incumbent on him to do so, notwithstanding a prohibition has been issued, the act done by him must be considered as done in pursuance of the County Courts Act, and he is entitled to notice of action(*c*).

All judges of courts of inferior jurisdiction acting under the authority of an Act of Parliament, are in general entitled to notice of action,

(*z*) 11 Geo. 4 & 1 W. 4. c. 36, s. 15. Moone *v.* Rose, L. R., 4 Q. B. 486; 38 L. J., Q. B. 236.

(*a*) See Edge *v.* Parker, 8 B. & C. 700. Under the 12 & 13 Vict. c. 106, s. 106, the messenger of the Court of Bankruptcy was entitled to the same protection as is allowed by law in the execution of a search warrant for property reputed to be stolen or concealed.

(*b*) See 30 & 31 Vict. c. 142, s. 10, *ante*, p. 675.

(*c*) Booth *v.* Clive, 10 C. B. 835; *ante*, pp. 711-717.

and to an opportunity of tendering amends and paying money into court, and the action against them must in general be brought within a certain limited period.

931 *Remedies against sheriffs and officers for an escape.*—Formerly the 13 Edw. 1, c. 11(*d*), and 1 Ric. 2, c. 12, give the party who suffered by an escape of his debtor the same remedy against a sheriff or gaoler guilty of the escape that he had against the debtor, and enabled him to recover from such sheriff or gaoler the whole debt and costs in an action of *debt;* but it has been enacted by 5 & 6 Vict. c. 98, s. 31, that if any debtor in execution shall escape out of legal custody, the sheriff, bailiff, or other person having the custody of such debtor, shall be liable only to an action upon the case for damages sustained by the person at whose suit such debtor was imprisoned, and shall not be liable to any action of debt in consequence of such escape.

932 *Actions to recover money in the hands of the sheriff.*—After a return to a *fi. fa.* that the money is levied, the sheriff may be liable to an action for money had and received without any demand of payment(*e*).

933 *Actions against high bailiffs of county courts(f) and their assistants.*—By the County Courts Amendment Act, 19 & 20 Vict. c. 108, s. 21, it is enacted that if an action be brought in the county court against an officer of the county court, the summons may issue in the district of which he is an officer, or in an adjoining district (although in a different county(*g*)), the judge of which is not the judge of a court of which the defendant is an officer; and it has been held that this section, by virtue of the operation of the 28 & 29 Vict. c. 99, s. 21, extends to suits in equity(*h*). By the County Courts Act, 9 & 10 Vict. c. 95, s. 138, notice of action is, as we have seen, required to be given to all persons acting in execution of that Act(*i*). If the bailiff of a county court, under a warrant against the goods of *A*, by mistake takes those of *B*, this is an act done in pursuance of the County Courts Act, which entitles the bailiff to notice of action(*k*).

934 *Statutory protection to high bailiffs(f), and persons acting by their order, or in their aid, in the execution of county court warrants.*—By 13 & 14

(*d*) This act is repealed by the 32 & 33 Vict. c. 83.

(*e*) Dale *v.* Birch, 3 Campb. 347. See *ante*, pp. 347, 348, as to the sheriff retaining in certain cases the proceeds of a levy for fourteen days.

(*f*) See 29 & 30 Vict. c. 14, s. 11, *ante*, p. 802.

(*g*) Partridge *v.* Elkington, L. R., 6 Q. B. 82.

(*h*) Linford *v.* Gudgeon, L. R., 6 Ch. App. 359.

(*i*) As to the form of notice, see Burton *v.* Le Gros, 34 Law J., Q. B. 91.

(*k*) Burling *v.* Harley, 3 H. & N. 271; 27 Law J., Exch. 258. As to parties interfering in the execution of the process, see Cronshaw *v.* Chapman, 31 Law J., Exch. 277.

Vict. c. 61, s. 19, it is enacted, that no action shall be brought against any high bailiff or bailiff, or any person acting by his order, or in his aid, for anything done in obedience to any warrant under the hand of the clerk of the county court and the seal of the said court, until demand hath been made, or left at the office of such high bailiff, by the party intending to bring such action, or by his attorney or agent, in writing, signed by the party demanding the same, of the perusal and copy of the warrant, and the same hath been refused or neglected for the space of six days after the demand; and in case, after demand and compliance therewith, by showing the warrant, and permitting a copy to be taken, any action shall be brought against the high bailiff, bailiff, or other person acting in his aid, for any such cause as aforesaid, without making the clerk of the court who signed or sealed the warrant defendant, then, on producing or proving the warrant at the trial of the action, the jury shall give their verdict for the defendant, notwithstanding any defect of jurisdiction or other irregularity in the warrant; and if the action be brought jointly against the clerk and high bailiff or bailiff, or person acting in his aid, then, on proof of the warrant, the jury shall find for the high bailiff, or bailiff, or person so acting as aforesaid, notwithstanding such defect or irregularity.

And by 19 & 20 Vict. c. 108, s. 60, it is further enacted, that no officer of a county court, in executing a warrant of a county court, and no person at whose instance any such warrant shall be executed, shall be deemed a trespasser by reason of any irregularity or informality in any proceeding on the validity of which such warrant depends, or in the form of such warrant, or in the mode of executing it, but the party aggrieved may bring an action for any special damage which he may have sustained by reason of such irregularity or informality against the party guilty thereof, and in such action he shall recover no costs, unless the damages awarded shall exceed forty shillings. Also (s. 55), that any warrant to a high bailiff, to give possession of a tenement under that statute, shall justify the bailiff named in the warrant in entering upon the premises named therein, with such assistants as he shall deem necessary, and in giving possession; but the entry must be made between the hours of nine in the morning and four in the afternoon, and the warrant must be executed within three months from the day it bears date (s. 56).

935 *Of the staying of proceedings in actions against high bailiffs and officers of the county court.*—The 30 & 31 Vict. c. 142, s. 31, enacts, that if any claim shall be made to goods or chattels taken in execution under the

process of a county court, or to the proceeds or value thereof by any person, it shall be lawful for the registrar of the court, upon application of the high bailiff, as well before as after any action brought against him, to issue a summons, calling before the court as well the party issuing the process as the party making the claim, and thereupon any action which may have been brought in any court in respect of such claim, or of any damage arising out of the execution of such process, shall be stayed; and the judge of the county court is to adjudicate upon the claim, and make such order in respect thereof, and of the costs, as to him shall seem fit. He is also to adjudicate between the parties, or either of them and the high bailiff, with respect to "any damage arising or capable of arising out of the execution of such process," and the costs of the proceedings: which order is to be enforced like any other order of the county court, and is to be final and conclusive between such parties and the high bailiff, unless the decision of the court be appealed from.

The above section is in substitution of the 118th section of the 9 & 10 Vict. c. 95, which is repealed, and under which it was held that if the county court judge decided in favor of the bailiff, the superior court in which an action had been brought against him would stay all further proceedings against him in the action, unless there was some substantive cause of complaint beyond that of entering the house to make the seizure(*l*), but that if it was decided against the bailiff, and it was found that he had entered the house and seized the goods of the wrong person, and had committed a trespass by entering the house as well as by seizing the goods, damages might in such a case be recovered against him for the unlawful entry into the house, as well as for the seizure of the goods(*m*). It was further held under that section that if the action was brought for an unlawful breaking and entering of the outer door of a dwelling-house, as well as for an unlawful seizure of the goods, the judge had no power to stay the proceedings, as no damages could have been awarded to the plaintiff for the trespass to the house on the hearing of the interpleader summons as to the goods before the county court(*n*). The first-mentioned section, however, now provides that the county court judge "shall" adjudicate on *any* claim "*capable of arising* out of the execution of the process." The claimant, therefore, cannot subsequently sue in a

(*l*) Jessop *v.* Crawley, 15 Q. B. 212.
(*m*) Foster *v.* Pritchard, 2 H. & N. 151; 26 Law J., Exch. 215.
(*n*) Cater *v.* Chignell, 15 Q. B. 219. Hollier *v.* Laurie, 3 C. B. 339.

superior court, for any special damages arising out of the execution, although he omitted to claim them in the county court(*o*).

936 *Plaintiffs in actions against sheriffs.*—To entitle a person to sue a sheriff or his officer for neglecting the duties of his office, he must show that he had sued out some process which entitled him to the performance of some duty at the hands of the sheriff which the latter has neglected or negligently executed, or he must show that he has been damnified either in his person or his property by some act of trespass, or wrongful and unauthorized proceeding, on the part of the sheriff; or if he sues upon an Act of Parliament giving damages to the party grieved, he must show that he is the party grieved within the meaning of the statute(*p*).

937 *Of the defendants in actions for wrongs done under color of legal process.*—The sheriff and his officer, who by inadvertence or mistake, have entered the house and seized the goods of the wrong person, or have arrested a wrong party, in the execution of legal process, are responsible for the trespass, "although the taking be by the showing of the party to the suit"(*q*); and so are all persons, whether plaintiffs, attorneys in the action or strangers, who interfere in any way, by giving directions or assistance, or officiously volunteering information to the officers (*ante*, p. 594); for every person who procures or directs the commission of an act of trespass is as much responsible for the injury as the person who actually commits it; but a simple intimation or direction to the officer that he is not to be prevented by an adverse claim from seizing goods found in the dwelling-house of the execution debtor, will not render the person, interfering to such an extent only, responsible for a wrongful seizure by the bailiff(*r*).

Sheriff's officers executing a writ of *ca. sa.* are not the agents or bailiffs of the plaintiff for whose benefit the writ is issued; and if they arrest a wrong person, the plaintiff in the action is not responsible for their misconduct, unless either he or his attorney have personally interfered, and have superintended or directed the movements of the sheriff or his officers(*s*). If the plaintiff in an action, or his attorney, does no more than set the court in motion, he is no trespasser, not-

(*o*) See Death *v.* Harrison, L. R., 6 Exch. 15.

(*p*) Woodgate *v.* Knachbull, 2 T. R. 158. Boyce *v.* Higgins, 14 C. B. 14. Hollis *v.* Marshall, 2 H. & N. 755.

(*q*) 2 Roll. Abr. 552. Jarmain *v.* Hooper, 7 Sc. N. R. 663; 13 Law J., C. P. 63; 6 M. & Gr. 848.

(*r*) Cronshaw *v.* Chapman, 7 H. & N. 911; 31 Law J., Exch. 277. See McNeeley *v.* Hunton, 30 Mo. 332.

(*s*) Wilson *v.* Tummon, 6 M. & Gr. 244; 6 Sc. N. R. 906. Walley *v.* M'Connell, 13 Q. B. 911. Woollen *v.* Wright, 1 H. & C. 554; 31 Law J., Exch. 513. Whitmore *v.* Greene, 13 M. & W. 104.

withstanding that such court should, on his motion, do an act of trespass by its officers, unless by special plea he admits and undertakes to justify his concurrence in the act, in which case he can only make out his justification by showing a legal authority under which he acted(*t*); and an attorney who merely delivers a writ of execution to the sheriff, and does not take upon himself to give wrong directions, and does not, by word or act, induce the officer to seize the wrong person, is not responsible for the mistakes of the officer and for a trespass committed by the latter in seizing the goods of such person, or seizing beyond the limits of his bailiwick, although he believes that the officer is about to go wrong and to exceed his duty(*u*). It has been held, however, that if the attorney gives wrong directions to the sheriff or his officers, and thereby causes them to seize the goods of the wrong person, the client is responsible for the act of the attorney(*x*).

If goods which have been let to hire to an execution debtor have been seized and sold by a sheriff under the writ of execution, the sheriff cannot, as we have seen, be sued, unless it be proved that the owner of the goods has sustained some actual damage by the act of the sheriff(*y*); but the purchaser who takes away the goods without any right or title so to do, may be made responsible in damages for the conversion of the property. If acts of trespass have been committed under color of legal process, which has been set aside as irregular, both the client who commands the attorney and the attorney who sues out the process are, as we have already seen, responsible as principals in the commission of the acts of trespass done by their procurement and commandment(*z*). They are in the same situation after the process has been set aside as if they had themselves, orally or by writing, desired the sheriff or his officer to make the seizure(*a*); but it is otherwise if the issue of the process is a judicial act, and the process is afterwards set aside, not for irregularity, but for error(*b*).

938 *Declaration against a sheriff for not executing the Queen's writ, or for an escape.*—The principle on which an action is maintainable against a

(*t*) Kinning *v.* Buchanan, 8 C. B. 291. Abley *v.* Dale, 10 C. B. 62. Painter *v.* Liv. Gas. Co., 3 Ad. & E. 433. See Hammon *v.* Fisher, 2 Grant's Cas. (Penn.) 330.

(*u*) Sowell *v.* Champion, 6 Ad. & E. 417.

(*x*) Jarmain *v.* Hooper, 6 M. & Gr. 850; 7 Sc. N. R. 681. Collett *v.* Foster, 2 H. & N. 361. Brooks *v.* Hodgkinson, 4 ib. 712; *ante*, p. 720.

(*y*) Tancred *v.* Allgood, 4 H. & N. 438; 28 Law J., Exch. 362.

(*z*) Codrington *v.* Lloyd, 8 Ad. & E. 449. Barker *v.* Braham, 3 Wils. 376. Bates *v.* Pilling, 6 B. & C. 39. Kerr *v.* Mount, 28 N. Y. 659.

(*a*) Tindal, C.J., Wilson *v.* Tummon, 6 Sc. N. R. 905; 6 M. & Gr. 236. Green *v.* Elgie, 5 Q. B. 114.

(*b*) Williams *v.* Smith, *ante*, p. 799.

sheriff for a neglect of duty in not arresting or in not making a levy in obedience to the Queen's writ directed to him, or for permitting an escape, is not simply because the plaintiff has sued out a writ and delivered it to the sheriff and the sheriff has not obeyed it, but because in mesne process he has a cause of action, in final process he has a judgment, against the defendant, which gives him an interest in the writ, and creates a duty in the sheriff towards him(*c*). There is no duty due from the sheriff to the person suing out a writ, unless he be entitled to do so. It is essential, therefore, in an action against a sheriff for disobeying a *ca. sa.* or a *fi. fa.*, that the party should show that he had a judgment in his favor, or was entitled to the due execution of a writ of *ca. sa.*, under the 6th section of the 32 & 33 Vict. c. 62, etc., *ante*, p. 756.

939 *Declarations against sheriffs for removing goods taken in execution without paying rent due to the landlord*, should show that a messuage, lands or tenements, had been demised by the plaintiff to a named tenant for a certain term, at a specified rent, payable half-yearly; that a certain sum of money, being half a year's or a year's rent of the messuage, etc., as the case may be, became due to the plaintiff, and that during the existence of the tenancy, and whilst the rent was in arrear, the defendant then being sheriff, seized certain goods and chattels of the tenant, then being upon the demised messuage, lands or tenements, etc., under a writ of execution against the tenant; that the defendant at the time of the seizure, and before the removal of the goods from the premises, had notice of the half-year's (or year's) rent so being due and in arrear(*d*), and that he nevertheless wrongfully removed the goods before the plaintiff had been paid the said arrears of rent, contrary to the statute in that behalf made(*e*).

940 *Declarations against sheriffs for treble damages for extortion* should set forth the recovery of the judgment; the issue of a writ of *fi. fa.* to the sheriff; the indorsement on the writ; the delivery of the writ to the defendant as sheriff of some specified county; the seizure by the defendant as sheriff; the amount of the levy; and that the defendant, by reason and color of his office, wrongfully received and took from the plaintiff, for the serving and executing the said execution, a certain specified sum(*f*), averring it to be a larger consideration and

(*c*) Jones *v.* Pope, 1 Saund. 38b.
(*d*) Andrews *v.* Dixon, 3 B. & Ald. 645.
(*e*) 8 Anne, c. 14, s. 1, *ante*, p. 793. Smallman *v.* Pollard, 6 M. & Gr. 1009. Riseley *v.* Ryle, 11 M. & W. 16. Thurgood *v.* Richardson, 7 Bing. 428.
(*f*) Ashby *v.* Harris, 2 M. & W. 673.

recompense than is limited and appointed to be taken in that behalf(*g*). When the action is brought against the sheriff's officer, the declaration should set forth the warrant made and delivered by the sheriff to the defendant, as one of his bailiffs, to be executed, and the levy made thereunder by the defendant, and the extortionate charges then made by him(*h*). When the declaration is for extortionate charges on the execution of several writs, the declaration should show what sum ought to have been taken, and what was the extortionate charge on each writ(*i*). It is not necessary to recite the statute; it is enough to state that the thing was done contrary to the form of the statute in such case made and provided(*k*).

941 *The plea of not guilty* in actions against a sheriff or his officers for an escape, operates as a denial of the neglect or default of the sheriff or his officers, but not of the debt, judgment, or preliminary proceedings(*l*). All matters of inducement set forth in the declaration, if intended to be denied and put in issue by the defendant, should be specially traversed(*m*); and all matters of justification and excuse must, as we have seen, be specially pleaded, and cannot be given in evidence under the general issue(*n*).

942 *Pleas of justification* must confess the assault or trespass, and set forth the facts and circumstances which justified it (*ante*, p. 726, *et seq*). A good justification for an assault and imprisonment is disclosed by a plea alleging, that at the time when the trespass was committed the defendant was sheriff of a certain specified county, and in that character was presiding at an election of knights of the shire to serve for the county in parliament; that the plaintiff made a great noise and disturbance at the election, and molested and obstructed him in the execution of his duty, upon which he ordered a constable to take the plaintiff into custody, and to carry him before a justice of the peace, to be dealt with according to law(*o*).

943 *Justification in the execution of legal process.*—A sheriff who justifies an act of trespass in the execution of a writ, does enough if he sets forth the writ of execution in obedience to which he acted, unless, by

(*g*) Pilkington *v.* Cooke, 16 M. & W. 615.
(*h*) Wrightup *v.* Greenacre, 10 Q. B. 8.
(*i*) Berton *v.* Lawrence, 5 Exch. 816.
(*k*) Holmes *v.* Sparkes, 12 C. B. 251.
(*l*) Reg. Gen. Hil. Term, 16 Vict. R. 16; 1 Ell. & Bl. App. lxxxi. Hodges *v.* Patterson, 26 Law J., Exch. 223.
(*m*) *Post*, ch. 21. s. 1. Traverse of the whole or part of a declaration.
(*n*) *Ante*, pp. 449-451. Howden *v.* Standish, 6 C. B. 518. Lewis *v.* Alcock, 3 M. & W. 188. Wright *v.* Lainson, 2 ib. 739. Hallett *v.* Lee, 3 Ala. 28.
(*o*) Spilsbury *v.* Micklethwaite, 1 Taunt. 146.

taking an indemnity, he has so identified himself with the judgment creditor as to place himself in the same position as the latter, in which case he must set forth and rely upon the judgment as well as upon the writ. If the plaintiff in the action, however, is not the execution debtor, but some third party suing the sheriff, the latter must then show not only the writ of execution, but the judgment. Therefore, where the sheriff or his bailiff sets up a claim against the plaintiff, to goods taken in execution under a writ against a third person, the sheriff must show a judgment against such third person, and his production of the writ of execution alone is not sufficient(*p*); and the reason for this seems to be, because the party against whom the judgment has passed might have applied to set it aside if there were error attending it; and if he omit to do so, it is presumed, from his acquiescence, that the judgment is right(*q*). A plea of justification by a private person, who has gone with the sheriff's officer to make an arrest, or who has personally interfered in aid of the sheriff, must show the judgment as well as the writ; the officer need show the writ and warrant only, unless he joins the other party in pleading, in which case he foregoes the benefit of his warrant(*r*). The stranger must set out the proceedings at length if he justifies under them, and if he does not, the plea of the officers who join with him in his justification is bad(*s*). A plea of justification by a sheriff's officer should set forth the warrant under which he acted(*t*).

944 *Replications.*—Where a man has abused an authority or license which the law gives him, by which he becomes a trespasser *ab initio*, if the defendant pleads such license or authority, the plaintiff must reply the abuse(*u*). Replications to pleas justifying under process which has been set aside, usually allege that the writ under which the defendant attempts to justify was irregularly sued out of the said court of, etc., and that afterwerds, by a certain order made by, etc., one of the judges, etc., bearing date, etc., and which order was afterwards made a rule of court, it was upon hearing, etc., and reading, etc., ordered that the said writ should be set aside for irregularity(*x*). The replication should show that the process was set aside under such

(*p*) White *v.* Morris, 11 C. B. 1015; 21 Law J., C. P. 185 Paige *v.* O'Neal, 12 Cal. 483. Jansen *v.* Acker, 23 Wend. 480. Brother *v.* Cannon, 1 Scam. 200.
(*q*) Bayley, J., Doe *v.* Murlep, 6 M. & S. 114.
(*r*) Andrews *v.* Marris, 1 Q. B. 17. Turner *v.* Felgate, 1 Lev. 95
(*s*) Morse *v.* James, Willes, 128.
(*t*) Hewitt *v.* Macquire, 7 Exch. 80. Cotes v. Michill, 3 Lev. 20.
(*u*) 1 Wms. Saund. 300h.
(*x*) Codrington *v.* Lloyd, 8 Ad. & E. 449. Jones *v.* Williams, 8 M. & W. 357. Rankin *v.* De Medina, 2 D. & L. 813.

circumstances as prevented it from being a justification to the defendant(*y*).

945 *Evidence at the trial—Proof on the part of the plaintiff.*—In actions against sheriffs for not arresting under a *ca. sa.*, or for not making a levy under a *fi. fa.*, or for permitting an escape, the plaintiff must, as we have seen, prove a judgment in his favor(*z*), the issue of a writ thereon, and the delivery of the writ to the sheriff to be executed, if those facts are traversed and put in issue by the pleadings. If it appears that the plaintiff has sued out void process, or that the judgment on which the process is founded is a void judgment, the plaintiff has no cause of action against the sheriff for neglecting to execute it, or for discharging a prisoner taken under it; but if the judgment is erroneous only, the sheriff cannot take advantage of the error(*a*).

946 *Proof of judgments, writs, and process from the superior courts.*—The usual mode of proving a judgment of a superior court is by an examined copy. The witness who produces the copy should prove that he examined it with the original record, and that the latter came from the proper custody(*b*). Writs and warrants, before they have been returned and have become matter of record, must be proved by the actual production of the instrument itself. Notice to produce the original writ, therefore, must in general be given to the sheriff, in an action against him for a breach of duty in neglecting to obey it.

947 *Dilivery of the writ to the sheriff to be executed.*—If a writ which has been delivered to the sheriff to be executed has been returned, and has become matter of record, the writ and its delivery to the sheriff, may be proved by an examined copy of the record, without the production of the writ itself(*c*).

Proof that a person has acted as sheriff is *primâ facie* evidence of his being sheriff, without proof of his appointment(*d*).

948 *Proof of the sheriff's having directed or authorized the commission of the wrongful act.*—In order to charge the sheriff with the act of the bailiff, it is not enough, as we have seen, to show that the person committing the wrongful act was a sheriff's officer duly appointed, and apparently acting as the sheriff's officer, and that he had given a bond of indemnity to the sheriff. It must be shown that he had a special authority

(*y*) Prentice *v.* Harrison, 4 Q. B. 852.
(*z*) Jones *v.* Pope, *ante*, p. 811.
(*a*) Gold *v.* Strode, Carth. 148. Shirley *v.* Wright, Cro. Jac. 775; Bull. N. P. 66. See Carpenter *v.* Willett, 31 N. Y. 90; Bensell *v.* Lynch, 44 N. Y. 162.
(*b*) Reid *v.* Margison, 1 Campb. 469; *post*, ch. 20.
(*c*) Ramsbottom *v.* Buckhurst, 2 M. & S. 565.
(*d*) Bunbury *v.* Matthews, 1 C. & K. 380.

from the sheriff to do the particular act of which the plaintiff complains. For this purpose the officer should be called, upon a subpœna duces tecum, to produce the original warrant under which he acted, which being the best evidence of the fact no other can be admitted, unless it is improperly withheld after notice to produce it; in which case secondary evidence may be given of its contents(*e*). If the warrant has been returned by the officer to the under-sheriff, notice should be given to the latter, or to the attorney of the sheriff, to produce it, if the sheriff is still in office(*f*). If the defendant has gone out of office, and the warrant has been sent to the persons who acted as his London agents whilst he was in office, and who are also his attorneys on the record, notice to them to produce the warrant is sufficient to entitle the plaintiff to give secondary evidence of its contents(*g*).

On production of the warrant bearing the sheriff's seal of office, it is right to presume that the seal was properly affixed, unless evidence to the contrary is adduced; and on production of the sealed warrant the plaintiff establishes a *primâ facie* case against the sheriff; and if the under-sheriff improperly issued it without having received a writ upon which it purports to be founded, the fact must be proved by the defendant as an answer to the plaintiff's case(*h*).

But the production of the warrant is not the only mode by which the privity of the sheriff with the act of the bailiff may be established. If the sheriff takes the fruits of an arrest made, or execution levied, by the officer, and ratifies and adopts the acts of the latter, he will have recognized him as his authorized agent in the particular transaction, and will be responsible accordingly(*i*). If it be proved that by the ordinary course of business in the under-sheriff's office the name of the officer who is to execute the writ is indorsed on the process, and the writ so indorsed is returned and filed, and the plaintiff offers in evidence a writ with the name of a bailiff indorsed upon it, and proves that the indorsement was made at the under-sheriff's office, or was made before it got there, and was afterwards adopted there, it will be *primâ facie* evidence that the person named in the

(*e*) Drake *v.* Sikes, 7 T. R. 113. Minshull *v.* Lloyd, 2 M. & W. 456. Curtis *v.* Fay, 37 Barb. 64.

(*f*) Taplin *v.* Atty, 3 Bing. 166.

(*g*) Suter *v.* Burrell, 2 H. & N. 867.

(*h*) Gibbons *v.* Phillips, 7 B. & C. 535, note.

(*i*) Martin *v.* Bell, 1 Stark. 416. Jones *v.* Wood, 3 Campb. 228. Woodgate *v.* Knatchbull, 2 T. R. 155.

indorsement was the person authorized by the sheriff to execute the writ, for if the warrant be granted to a different officer, the sheriff has the means of proving it(*k*). But the mere production of the writ and indorsement, without proof that the indorsement was made in the sheriff's office, or adoptod by the sheriff, will not be sufficient to implicate the sheriff(*l*).

If upon the pleadings the defendant, as sheriff, admits his participation in the act of the officer, it is of course unnecessary to produce and prove the warrant(*m*).

949 *Proof of false return to a writ.*—If it be proved that a debtor whom the sheriff ought to have arrested in obedience to a writ lodged in his hands, did not abscond, but continued in the daily exercise of his usual occupation, or appeared publicly as usual, or was to be found at his home or his usual haunts, and the sheriff neglected to arrest him, and returned *non est inventus* to the writ, there will be abundant evidence of a false return(*n*).

950 *When admissions by an under-sheriff and bailiff's are evidence against the sheriff.*—The statements and declarations of an under-sheriff are no evidence to charge the sheriff, unless they accompany some official act, or unless they tend to charge himself, he being in truth the real party in the cause(*o*). What a bailiff says in a general conversation with any indifferent person, certainly is not evidence against the sheriff; but declarations made by him in the course of the execution of a writ to parties interested in making the inquiry, are evidence against the sheriff in the particular matter to which they relate(*p*).

951 *Proof of the removal of goods taken in execution without paying the landlord's rent.*—If the material facts of the tenancy, the rent in arrear, the seizure of the goods, the defendant's knowledge of the rent being in arrear, and the removal of the goods without payment of it, as set forth in the plaintiff's declaration, are traversed by the pleadings, the plaintiff must establish them in evidence by production and proof of a written demise, where the tenant holds under a writing(*q*), and by showing that a certain ascertained rent was payable and in arrear at the time of the levy, knowledge thereof on the part of the sheriff or

(*k*) Scott *v.* Marshall, 2 Cr. & Jerv. 242. Tealby *v.* Gascoigne, 2 Stark. 202.
(*l*) Hill *v.* Sheriff of Middlesex, 7 Taunt. 8.
(*m*) Reed *v.* Thoyts, 6 M. & W. 415.
(*n*) Beckford *v.* Montague, 2 Esp. 476. Brown *v.* Jarvis, 1 M. & W. 704. Randell *v.* Wheble, 10 Ad. & E. 719.
(*o*) Snowball *v.* Goodricke, 4 B. & Ad. 543.
(*p*) North *v.* Miles, 1 Campb. 390. Jacobs *v.* Humphrey, 2 Cr. & M. 414.
(*q*) Augustien *v.* Challis, 1 Exch. 279.

his officer(*r*), and an actual removal of the goods without payment of the rent(*s*).

952 *Evidence of the process under which the sheriff acted.*—When the existence of the authority under which the sheriff acted is put in issue by the pleadings, it is in general enough, as we have seen, to prove the writ under which he acted. If the plaintiff, in order to prove his case against the sheriff, puts in evidence the warrant from the sheriff to his officer, he does not thereby make the recital of the writ in the warrant to the sheriff evidence for the latter of the writ, and dispense with the necessity of proof of it by the sheriff(*t*).

953 *Evidence for the defence—Proof of rent being in arrear at the time of the levy.*—If the sheriff, in order to support a return of *nulla bona*, or to defend himself against an action for negligence in not levying under a writ of *fi. fa.*, is driven to show that rent was due to the landlord, the lease itself must be produced if it appear that there was a written demise(*u*). In an action against a sheriff for neglecting to levy under a *fi. fa.*, it is not enough for the sheriff to show that the landlord made a claim for a year's rent, which exceeded the value of the goods. The sheriff must prove that the rent was actually due. Where the sheriff relied upon an actual payment by him of rent claimed to be due to the landlord, Lord Ellenborough held, that if he had before him reasonable evidence of the rent being in arrear, and a sight of the lease, where the debtor held under a lease, there would be a *primâ facie* case in favor of the sheriff, and it would be for the plaintiff to show that the rent was not due(*x*). If the sheriff has given notice to the execution creditor of the claim of rent, and the latter assents to the proceedings of the sheriff in respect thereof, he cannot of course afterwards turn round and complain of what he has himself sanctioned, although both he and the sheriff may have been deceived, or have acted under a misapprehension, or taken some erroneous view of the matter(*y*).

954 *Proof of proceedings in the county court.*—The 9 & 10 Vict. c. 95, s. 111, requires the clerk of every county court to cause a note of all plaints, judgments, orders, and proceedings in the court, to be fairly entered in a book to be kept at the office of the court, and the entries

(*r*) Riseley *v.* Ryle, 11 M. & W. 16. Hoskins *v.* Knight, 1 M. & S. 245. Saunders *v.* Musgrave, 6 B. & C. 524. Andrews *v.* Dixon, 3 B. & Ald. 645.
(*s*) Smallman *v.* Pollard, 6 M. & Gr. 1001. Wharton *v.* Naylor, 12 Q. B. 679.
(*t*) White *v.* Morris, 11 C. B. 1033, overruling Bessey *v.* Windham, 6 Q. B. 166.
(*u*) Augustien *v.* Challis, 1 Exch. 279.
(*x*) Keightley *v.* Birch, 3 Campb. 523.
(*y*) Stuart *v.* Whittaker, Ry. & M. 310.

in this book, or a copy thereof, bearing the seal of the court, and purporting to be signed and certified as a true copy by the clerk of the court, are to be admitted in all courts as evidence of such entries, and of the proceedings, and of the regularity thereof, without any further proof.

955 *Damages recoverable in actions against sheriffs and officers—Negligence and breach of duty.*—Whenever it has been proved that the sheriff owed a duty to the plaintiff, and that there has been a breach of that duty, nominal damages are recoverable, although there is no proof of any actual pecuniary damage having been sustained by the plaintiff. When a debtor has been taken in execution and lodged in gaol, the execution creditor has a right to have him kept in gaol; if, therefore, the sheriff allows the debtor to go beyond the limits of the prison for ever so short a period, there is an infringement of the legal right of the execution creditor, in respect of which damages are recoverable by him, though no actual damage be proved(*z*). So if a sheriff, having had a writ of *ca. sa.* put into his hands, unnecessarily delays putting it in force, and there is no proof of actual pecuniary damage from the delay, nominal damages are recoverable, for the plaintiff's right to have the body of his debtor detained has been invaded through the breach of duty by the sheriff. If actual loss has been sustained the plaintiff will be entitled to recover the amount of such loss(*a*). However, the above rule does not apply to writs of *fi. fa.*, and in such cases, although *primâ facie* the measure of damages is the value of the goods which might have been taken, yet it is for the jury to say under all the circumstances, whether, if the execution had been levied, the plaintiff would have derived any benefit from it; as, for instance, if the other creditors of the execution debtor were in a position to make him a bankrupt(*b*). Nor will the plaintiff in such a case be entitled to nominal damages(*b*).

If the sheriff has improperly delayed the execution of a writ, and the plaintiff has been put to expense in trying to have the writ executed, he may be entitled to recover these expenses as part of the dam-

(*z*) Williams *v.* Mostyn, 4 M. & W. 153. See Haines *v.* East India Co., 11 Moore, P. C. Ca. 39.

(*a*) Clifton *v.* Hooper, 6 Q. B. 474. The sheriff may show in mitigation of damages, that at the time the judgment was rendered and afterwards the defendant was insolvent, and that nothing could have been gained by an arrest. Dinniny *v.* Fay, 38 Barb. 18.

In case of gross neglect on the part of the officer to execute a writ, the measure of damages is the probable loss sustained by the plaintiff. Phillips *v.* Ronald, 3 Bush (Ky.), 244.

(*b*) Hobson *v.* Thelluson, L. R., 2 Q. B. 642. Ledyard *v.* Jones, 7 N. Y. 550. Weld *v.* Bartlet, 10 Mass. 474. Humphrey *v.* Hathorn, 24 Barb. 278. Snoddy *v.* Foster 1 Met. (Ky.) 169. Bowman *v.* Cornell, 39 Barb. 69.

ages(c). In an action against a sheriff for not selling the execution debtor's share in chattels, in which he was jointly interested with another person, Lord Ellenborough said to the jury, "I cannot lay down any measure for your assessment of damages short of half the value. In giving any other you will take a leap in the dark. Some purchasers might think the value depreciated by the co-partnership, others might not regard the circumstance"(d).

In an action against a sheriff or his officer for the wrongful taking of goods, the plaintiff, if he recovers a verdict, is entitled to the full value of the goods. It is not competent for the sheriff to say as to part of it, "I have paid rent," for, being a wrong-doer, he had no right to take upon himself to apply the proceeds of the wrongful sale(e). So, in an action against a sheriff for taking the plaintiff's goods under process upon a regular judgment, but in a place to which the process did not extend, the plaintiff is entitled to recover the whole value of the goods and not merely the damage he has sustained by their being taken in a wrong place(f). Whenever a public officer has wrongfully seized and detained goods from the owner, the latter is entitled to recover all the loss resulting from the wrongful act, so that if the property detained has fallen in value in the market, the plaintiff is entitled to add the amount of that to the other damage he has sustained(g). But if a sheriff takes goods in execution after an act of bankruptcy, and sells them, the jury may, in an action by the trustee in bankruptcy for the unlawful taking, allow to the sheriff the expenses of the sale, if they think the trustee must have sold the goods if they had not been sold by the sheriff(h).

If a sheriff or his officer threatens to make a levy on goods which belong to the plaintiff, and the latter, in order to prevent his goods from being seized and sold, pays a sum of money to such sheriff or officer, he is entitled to recover back the money on proving that the sheriff had no right to make the levy or seize the goods he threatened to seize(i).

In actions for unlawfully removing goods without paying rent due to the landlord, the damages recoverable by the latter are not limited

(c) Mason v. Paynter, 1 Q. B. 974.
(d) Tyler v. Leeds (Duke of), 2 Stark. 222.
(e) White v. Binstead, 13 C. B. 308; 22 Law J., C. P. 115.
(f) Sowell v. Champion, 6 A. & E. 407.
(g) Barrow v. Arnaud, 8 Q. B. 609. See Cassin v. Marshall, 18 Cal. 689; Dexter v. Paugh, 18 Cal. 372.
(h) Clark v. Nicholson, 6 C. & P. 712; 1 C. M. R. 794. See *ante*, pp. 427, 428.
(i) Valpy v. Manley, 1 C. B. 602.

to the amount realized by the sheriff on the sale of the goods, but the landlord may recover the actual damage sustained by him by the sheriff's neglect of duty, whatever that may be(*k*).

956 *Assessment of damages in actions for an escape.*—"The true measure of damages," observes Jervis, C.J., "in actions against a sheriff for an escape, is the value of the custody of the debtor at the moment of the escape, and no deduction can be made therefrom on account of anything which the plaintiff might have obtained by diligence after the escape. If the *laches* of the plaintiff could be used to mitigate the damages against the sheriff, the plaintiff would be compelled in every case to issue a fresh writ, and incur expense, to relieve himself to some extent from the consequence of the sheriff's negligence. It must not, however, be understood that the plaintiff's conduct can, under no circumstance, have a material bearing upon the damages. If he has done anything to aggravate the loss occasioned by the sheriff's neglect, or has prevented the sheriff from retaking the debtor, the damages would be materially affected by such conduct"(*l*).

"The damages to be paid by the sheriff must be assessed according to the circumstances of each particular case. If the execution debtor had not the means of satisfying the judgment at the moment of the escape, the plaintiff will have lost only the security of the debtor's body, and the damages may be small." But the jury may take into consideration the fact that the debtor, though insolvent, is the only son of a wealthy and aged father, and that the debtor's solicitor had before the arrest offered a composition of six shillings in the pound; in other words, the chance that the debt or some part of it might be recovered by the pressure put upon the debtor(*m*).

957 *Special damages.*—All special and extraordinary damage, which is the natural and direct result of the wrongful act of which the plaintiff complains, is recoverable by him if it is set forth and claimed in the declaration(*n*). The cost of setting aside a judgment for irregularity, however, cannot be made the subject of special damage in an action against the plaintiff or his attorney for seizing the plaintiff's goods

(*k*) Foster *v.* Hilton, 1 Dowl. P. C. 38. Calvert *v.* Joliffe, 2 B. & Ad. 421.

(*l*) Arden *v.* Goodacre, 11 C. B. 375. Loosey *v.* Orser, 4 Bosw. (N. Y.) 391.

The sheriff may show in mitigation of damage in an action for an escape that the prisoner was insolvent, or wholly destitute of property. Hootman *v.* Shriner, 15 Ohio St. 43. Metcalf *v.* Stryker, 31 N. Y. 255. Smith *v.* Knapp, 30 N. Y. 581. Russell *v.* Turner, 7 Johns. 189. See Willey *v.* Eure, 8 Jones' Law (N. C.), 320.

But this evidence is inadmissible in an action against the sheriff as bail. Bensel *v.* Lynch, 44 N. Y. 162.

(*m*) Macrae *v.* Clark, L. R., 1 C. P. 403. Murphy *v.* Troutman, 5 Jones' Law (N. C.). 379.

(*n*) *Ante*, pp. 378, 609; *post*, ch. 23.

under color of the irregular judgment, if such costs have been applied for, and refused by the court on motion(*o*).

958 *Exemplary damages.*—Where trespasses of a serious nature have been committed by officers of the law under color of legal process, exemplary damages are recoverable. Violent and illegal conduct on the part of officers charged with the execution of legal process "is calculated to lead to dangerous conflicts; and when it is proved to the satisfaction of a jury to have taken place, the proper amount of damages to be awarded must depend so much upon the general circumstances that it is very difficult to discover any standard by which to measure the amount"(*p*); and the court will not interfere, on behalf of the sheriff or his officers, with the constitutional functions of the jury in assessing the damages, although it may do so, if the defendant making the application, and who was jointly sued with the sheriff, was not implicated in the aggravations justifying the amount of damages as against the sheriff(*q*).

959 *Recovery of treble damages for extortion.*—If the plaintiff, in an action against a sheriff for extortion, frames his declaration on the statute of Elizabeth (*ante*, pp. 801, 811) for the recovery of treble damages, the jury should be asked to assess the actual damage sustained, and the finding should be entered upon the record as the actual damage, so as to entitle the plaintiff to judgment for treble the amount found by the jury(*r*).

(*o*) Loton *v.* Devereux, 3 B. & Ad. 345.
(*p*) Brunswick (Duke of) *v.* Slowman, 8 C. B. 331. Nightingale *v.* Scannell, 18 Cal. 315.
(*q*) Gregory *v.* Cottrell, 1 Ell. & Bl. 369; 22 Law J., Q. B. 217.
(*r*) *Post*, ch. 21, s. 1, DOUBLE AND TREBLE DAMAGES. Buckle *v.* Bewes, 4 B. & C. 154.

CHAPTER XV.

OF TRESPASSES AND INJURIES COMMITTED IN EXECUTION OF WARRANTS AND ORDERS OF JUSTICES—RESPONSIBILITY OF MAGISTRATES, CONSTABLES, THEIR ASSISTANTS, AND PERSONS SETTING THEM IN MOTION—REMEDIES FOR WRONGS DONE UNDER COLOR OF CONVICTIONS AND WARRANTS OF JUSTICES.

SECTION I.—*Of trespasses in the execution of warrants and orders of justices.*—Jurisdiction of justices—Summary conviction—Liability of justices for misconduct—Search-warrants—Liability of justices acting without jurisdiction—Their exemption from actions where no objection was taken to their jurisdiction—Interested justices—Wrongful commitments—Summary convictions, orders, and adjudications—Unlawful proceedings without information—When complaint cannot be withdrawn—Ouster of jurisdiction by claim of title—Exercise of discretionary power—Wrongful ministerial acts—Convictions upon by-laws—Of the drawing-up of convictions and orders—Disclosure of jurisdiction—Warrants of distress and commitment—Power of appeal—Execution of convictions and orders after notice of appeal—Statement of a case—Quashing of convictions and orders—Commitment for contempt—Removal by certiorari—Proof of circumstances calling for interference—Amendment of orders, etc.—Habeas corpus—Costs ordered by justices.

SECTION II.—*Duties and responsibilities of constables.*—Exemption of constables and their assistants from liability for acts done in obedience to a warrant—Excess of authority on the part of constables.

SECTION III.—*Remedies for wrongs done under color of convictions and warrants of justices.*—Replevin of chattels distrained—Actions against justices for things done without jurisdiction, for malicious convictions, commitments, and distresses—Effect of the existence of a power of appeal—Vexatious actions—Setting aside actions—Limitation of actions—Notice of action—Tender of amends—Parties, pleadings, defences, and evidence—Damages recoverable.

SECTION I.

OF TRESPASSES AND INJURIES COMMITTED IN THE EXECUTION OF WARRANTS AND ORDERS OF JUSTICES.

960 *Of the jurisdiction of justices of the peace*(a).—The ancient conservators of the peace, the nature and extent of whose power and authority are now unknown, were formerly elected by the freeholders of the county; but since the reign of Edward III. they have been appointed by the crown. By the 34 Edw. 3, c. 1, it is enacted, that in every county in England there shall be assigned for the keeping of the peace one lord, and with him three or four of the most worthy of the county, with some learned in the law; and they shall have power to restrain offenders, rioters, and all other barrators, and cause them to be imprisoned and duly punished according to the law and customs of the realm; and inform themselves of pillors and robbers who go wandering about and will not labor, and put them in prison, and take of all them that be not of good fame sufficient surety and mainprize of their good behavior, and duly punish others; and hear and determine, at the king's suit, all manner of felonies and trespasses done in their several counties, according to the laws and customs of the realm. From this statute, therefore, it appears that justices of the peace were to be appointed by commission from the crown; that they were to have authority to hold a court, and were to be judges of a court of record. Courts accordingly were holden by them for hearing and determining offences within their cognizance; records were kept by them of their proceedings in these courts, and each justice named in the commission came to be called *custos rotulorum*, or keeper of the records and rolls of the the county(b).

The power "to hear and determine" gave justices of the peace authority only to hear and determine through the medium of the common-law method of inquisition, by the verdict of a jury, "for that is implied by law, and the court will adjudge as the law appoints, although it be not so expressed"(c).

Hence, justices were under the necessity of holding sessions and assemblying juries for the trial of all offences of which they had

(a) See *ante*, p. 322.
(b) Holt, C.J., Harcourt v. Fox, 1 Show. 507.
(c) See Holland's case, 4 Co. 74a, 74b.

cognizance; and these sessions were by 36 Edw. 3, stat. 1, c. 12, commanded to be held at least four times a year. Special sessions were afterwards directed to be held for executing certain statutes which the justices were charged to execute, and they were enjoined the diligent perusal and study of these statutes at the Easter sessions in every year(*d*).

Where a trial or other proceeding is commenced at one sessions, and is continued and concluded at another, the continuity of the proceeding and the jurisdiction of the court must be preserved by a formal adjournment, otherwise the proceeding is *coram non judice*, and will be a nullity(*e*).

The form of the commission of the peace as it exists at present, is said to have been settled by the judges in the 33rd year of Queen Elizabeth's reign(*f*). It assigns the several persons named in it, and every one of them jointly and severally, the queen's justices, to keep the peace in a particular county, and to cause to be kept all statutes made for the good of the peace and the quiet government of the people; and to punish all who offend against any of the said statutes; and to cause to come before them all who shall threaten any of the people as to their persons, or the burning of their houses, in order to compel them to find surety for the peace or good behavior; and if they shall refuse to find such surety, to cause them to be safely kept in prison till they shall find it: also to inquire, upon the oath of good and lawful men of the county, of all felonies, trespasses, and offences, of which justices of the peace may lawfully inquire, etc.(*g*).

Besides the general authority confided to justices by the commission of the peace, they are clothed by various Acts of Parliament with a special and particular jurisdiction over particular offences, which jurisdiction must be exercised sometimes by one justice and sometimes by two; sometimes in their sessions, and sometimes out of their sessions. Whenever these statutory powers are exercised by justices, care must be taken that the special authority is strictly pursued.

Every single justice has regularly a jurisdiction for the preservation of the peace through the whole county by virtue of his commission, but the power of hearing and determining offences is by the com-

(*d*) 33 Hen. 8, c. 10.
(*e*) Rex v. West Torrington, Burr. S. C. 293. Reg. v. Payn, 34 Law J., Q. B. 59.
(*f*) 2 Hawk. P. C. c. 8, s. 2.
(*g*) Dalt. J. P. Ch. 5.

mission given to two or more; and whenever a thing is required to be done by two justices, they must both be present at the execution of it. A justice has no power to do any judicial act out of his county, but he may do a merely ministerial act, such as the taking of an information(*h*).

A justice of the peace has jurisdiction to require sureties for good behavior from persons charged with aggravated defamation, and with persisting in a continued course of libelling. Therefore, where a person persisted in writing libels upon a wall against a private individual, and was required to find sureties for his good behavior, and in default was committed to prison, it was held that the justice had acted in a matter over which he had jurisdiction(*i*). If the charge be of an offence over which, if the offence charged be true in fact, the magistrate has jurisdiction, the magistrate's jurisdiction cannot be made to depend upon the truth or falsehood of the facts, or upon the evidence being sufficient or insufficient to establish the *corpus delicti*, nor can the jurisdiction be ever held to depend upon the value or credibility of the evidence(*j*).

961 *Jurisdiction of justices residing or being out of the county of which they are justices.*—A justice of the peace for one county, riding, division, liberty, city, borough, or place, may act for the same whilst residing, or being in an adjoining county, riding, etc., of which he is also a justice; and a justice of the peace for any county at large, riding, division, or liberty, may act as such within any city, town, or precinct next adjoining thereto, or surrounded thereby, being a county of itself, or otherwise having exclusive jurisdiction(*k*).

962 *Jurisdiction of borough justices under the Municipal Corporation Act.*—By s. 111 of 5 & 6 Wm. 4, c. 76, county justices have concurrent jurisdiction with borough justices in boroughs which have not received the grant of a separate court of quarter sessions.

All offences committed within any borough against the provisions of any local Act of Parliament, are cognizable by the justices of the borough, and such justices possess all the powers and jurisdiction with respect to such offences which were formerly possessed by county justices(*l*). These, and all other offences punishable in boroughs upon summary conviction, must be prosecuted in conformity with the pro-

(*h*) 2 Hale, P. C. 51.
(*i*) Haylock *v.* Sprake, 22 Law J., M. C. 72.
(*j*) Cave *v.* Mountain, 1 M. & Gr. 262.
(*k*) 11 & 12 Vict. c. 42; 26 & 27 Vict. c. 43, s. 6, 25; 26 & 27 Vict. c. 77.
(*l*) 7 Wm. 4, & 1 Vict. c. 78, s. 31.

visions of the statutes regulating the proceedings of justices (*post*, p. 837, *et seq.*); but the prosecution for the offence must be commenced within three calendar months(*m*), and any person who thinks himself aggrieved by the summary conviction may appeal to the court of quarter session for the borough or the county(*n*).

963 *The power of summary conviction* of offenders by justices without the intervention of a jury is entirely the creature of the statute law. No such power is accorded to them by the common law. "In very early times such a power appears to have been conferred upon them in two cases, which seemed in their nature to require a speedy interference; but even in these it was confined to their own view. These are the cases of forcible entries, 12 Ric. 1, c. 2, and of riots, 13 Hen. 4, c. 7; in the latter of which, it may be remarked, this extraordinary jurisdiction is carefully limited by the urgency of the occasion, by which alone, therefore, it was probably thought to be justified; for it is there directed, that if the rioters had departed before the arrival of the justices, so that the view could not be had, they are then to inquire of the matter, not by themselves, but by means of a jury, which they are specially directed in that case to summon. One other instance also occurs of a power to convict without jury, and that was on confession of the party, viz., by the Act of 2 Hen. 5, st. 1, c. 4, relating to laborers, which authorized them to examine laborers, etc., on their oath, and on *their confession* to punish them *as if they were convict by inquest.* These two cases of view and confession seem to be the only clear instances in which justices of the peace were empowered in those early times to inflict punishment upon their own inquiry and judgmont"(*o*).

"The earliest statute upon which a summary conviction by a justice is on record, or of which a precedent is found in the books, is that of 33 Hen. 8, c. 6, against the practice of carrying daggs or short guns. Lambard has given a precedent of a conviction upon this statute(*p*), and there appears to have been one removed into the Court of Queen's Bench by certiorari as early as the 43rd year of Elizabeth, A.D. 1600; and this very case affords a proof of the objection, which, in the state of manners at that day, might well exist, against relaxing the jealousy of the common law by intrusting anything like arbitrary authority in private hands"(*q*).

(*m*) 5 & 6 Wm. 4, c. 76, s. 127; 11 & 12 Vict. c. 43, s. 11.
(*n*) 5 & 6 Wm. 4, c. 76, s. 131.
(*o*) Paley on Summary Convictions, Introd., pp. 5, 6, 5th ed.
(*p*) Lambard's Justice, p. 298.
(*q*) Paley, *ut sup.*, pp. 13, 14.

Until recently justices of the peace had no power to convict summarily for felony, but by 18 & 19 Vict. c. 126, power is given to justices of the peace assembled at petty sessions to hear and determine charges of larceny in a summary way, without the intervention of a jury, where the value of the property stolen does not in the judgment of such justices exceed 5*s*., and the person charged consents to have the case heard and determined by such justices.

964 *Liability of justices for misconduct in the exercise of their judicial functions.*—A justice of the peace who acts corruptly in the discharge of the duties of his office, and uses the power of the law for the purpose of injuring and oppressing those over whom he has authority, and gratifying his own private animosity, is responsible in damages to the parties injured; but it must be proved that he has acted wrongfully from personal motives of spite or ill-will, or, in legal parlance, that he "has acted maliciously, and without reasonable and probable cause," for he cannot be made responsible for an erroneous judgment, or for mere mistakes, or for ignorance, negligence, or misconduct, not amounting to an abuse of his authority(*r*).

965 *Of the granting of search-warrants by magistrates.*—Upon a representation to a magistrate that a person has reason to suspect that his property has been stolen and is concealed in some specified place, the magistrate may lawfully issue his warrant to search the place and to bring the occupier or owner before him. It need not be a positive and direct averment upon oath that the goods are stolen, in order to justify the magistrate in granting his warrant. If a warrant is issued without due authority on the part of the magistrate, and a house is entered and searched under it, that is a trespass on the part of the magistrate. And if a person goes before a magistrate and falsely and maliciously, and without reasonable and probable cause, makes such a representation to a magistrate as induces him to grant a search-warrant, the person so acting is responsible in damages in an action for a malicious prosecution(*s*). The power of a justice to grant a search-warrant is now extended to property in, or near, or with respect to which, any offence, punishable either upon indictment or summary conviction by

(*r*) Pease *v.* Chaytor, 32 Law J., M. C. 121; *post*, s. 2. State *v.* Porter, 3 Brevard, 175. Garfield *v.* Douglass, 22 Ill. 100. Morgan *v.* Dudley, 18 B. Mon. (Ky.) 693. Kennedy *v.* Barnett, 64 Penn. St. 141. See Mangold *v.* Thorpe, 33 N. J. Law, 134; Carter *v.* Dow, 16 Wis. 298; Downing *v.* Herrick, 47 Me. 462; Bailey *v.* Wiggins, 5 Harring. (Del.) 462.

(*s*) Elsee *v.* Smith, Wyatt *v.* White, *ante*, pp. 748, 749. 4 Inst. 177. See Muse *v.* Vidal, 6 Mumf. 27.

virtue of the Criminal Law Consolidation Act (24 & 25 Vict. c. 96), has been committed(*t*).

966 *Liability of justices for acts done by them without jurisdiction, or in excess of their jurisdiction.*—If magistrates while occupying the bench from which magisterial business is usually administered, publicly disseminate slanders under the pretence of giving advice, they are no more privileged than if they were illiterate mechanics assembled in an alehouse(*u*). If a magistrate convicts an accused person of an offence without having any jurisdiction in the matter, and then proceeds to sign and issue a warrant of commitment or distress, under which an imprisonment is effected or goods are seized, the conviction may be removed into the Court of Queen's Bench and quashed by certiorari, and an action may then, and not before, be commenced against the magistrate (*post*, s. 2), to recover damages for the wrong done. Similar proceedings may be taken against him where he has exceeded his jurisdiction, and done more than he was authorized by law to do(*v*).

967 *Exemption of justices from actions in cases where they had a primâ facie jurisdiction, and no objection was taken to their jurisdiction until after they had adjudicated.*—If, under the special powers of particular Acts of Parliament, justices have a *primâ facie* jurisdiction to inquire into and adjudicate upon certain matters that have been brought before them, and nothing appears, either on one side or the other, to show any want of jurisdiction, they are exempt from liability in respect of their proceedings in the matter(*x*). Thus, where an Act of Parliament gave certain magistrates a general jurisdiction over disputes between cer-

(*t*) 24 & 25 Vict. c. 96, s. 103. See 32 & 33 Vict. c. 12, s. 10; c. 57, s. 6.

(*u*) Ld. Campbell, C.J., in Lewis v. Levy, Ell. Bl. & Ell. 554; 27 Law J., Q. B. 282.

(*v*) Trespass will lie against a justice of the peace who acting without jurisdiction injures another in person or property. Adkins v. Brewer, 3 Cow. 206.

If a justice of the peace in a suit before him renders judgment by default after the expiration of the time in which he is by law authorized to render such judgment, and causes the defendant to be arrested and imprisoned on an execution issued on such judgment, the justice will be liable in trespass for such arrest and imprisonment. Dyer v. Smith, 12 Conn. 384. Spencer v. Perry, 5 Shep. 413.

And where a justice of the peace after finally disposing of a cause tried by him, commits a witness for contempt at the trial he thereby renders himself liable to an action by the witness. Clark v. May, 2 Gray (Mass.), 410. So if the justice in the course of a trial of which a police court has exclusive jurisdiction commits a witness for contempt, he renders himself liable to an action by the witness. Piper v. Pearson, 2 Gray (Mass.), 120. And where the power to admit to bail or to commit to jail any person on a felonious charge is exercisable only by two justices, and a single justice assumes to act in the matter, he so far exceeds his jurisdiction as to render his acts void and to lay himself open to prosecution for damages at the suit of the person imprisoned or bailed. Revill v. Pettit, 3 Met. (Ky.) 314.

And generally a justice of the peace who acts in a case of which he has no jurisdiction or who exceeds his jurisdiction knowing the facts which deprive him of jurisdiction, is liable in damages to the party injured. Id. Piper v. Pearson, 2 Gray (Mass.), 120. Clark v. May, id. 410. Blood v. Sayre, 17 Vt. 609. Adkins v. Brewer, 3 Cow. 206.

(*x*) Calder v. Halkett, 3 Moore, P. C. C. 68. Pease v. Chaytor, 33 Law J., M. C. 121.

tain friendly societies and their members, excepting where the rules of the society contained an arbitration clause, and certain disputes were brought before a magistrate, who adjudicated thereon in ignorance of the existence of the arbitration clause in the rules of the society, which deprived him of jurisdiction, it was held that he was not responsible for his want of jurisdiction. "When a party," it was observed by the court, "relies on an exception from a general law, the burthen is on him to show that his case falls within the exception; and if the society had produced before the magistrate the clause in their rules enabling them to refer their disputes to arbitration, the magistrate would have had an opportunity of judging whether he had any jurisdiction or not: but they omitted to do this, and the magistrate's attention was never called to the denial of his jurisdiction"(*y*).

So, if a person be exempted from serving a particular office, and, on being called before a magistrate to show cause why he refuses to do so, if he do not inform the magistrate of the particular ground of his exemption, he cannot maintain an action against the magistrate who orders proceedings to be taken against him in consequence of such refusal(*z*).

In a case that arose on the 20 Geo. 2, c. 19, giving magistrates jurisdiction to determine differences between masters and servants in husbandry, and other laborers, respecting wages(*a*), it was held that an action of trespass would not lie against magistrates, acting upon a complaint made to them on oath, by the terms of which it appeared that they had jurisdiction, although the real facts of the case might not have supported such complaint, if such facts were not laid before them at the time by the party complained against, he having notice of such complaint, and being duly summoned to attend. "The facts stated in the case," observes Lord Ellenborough, "are not stated as facts appearing before the magistrates at the time, and, in order for the plaintiff to avail himself of them, it should have appeared that the same facts were stated to the magistrates before whom he had notice to appear; for how, otherwise, could the magistrates be affected as trespassers, if the facts stated to them upon oath by the complainant were facts whereof they had jurisdiction to inquire, and nothing appeared in answer to contradict the first statement"?(*b*).

(*y*) Pike *v.* Carter, 10 Moore, 376.
(*z*) Best, C.J., 10 Moore, 386.
(*a*) See 30 & 31 Vict. c. 141, continued by 31 & 32 Vict. c. 111.
(*b*) Lowther *v.* Radnor (Earl of), 8 East, 113.

968 *Wrongful proceedings by justices interested in the matter before them.*—A justice of the peace ought never to execute his office in his own case, or in any case in which he is himself personally interested(*c*), but must cause the offender to be carried before some other justice. "And therefore the Mayor of Hereford was laid by the heels for sitting in judgment where he himself was the complainant, though, by the charter, he was the sole judge of the court"(*d*). And where a justice of the peace, being also a surveyor of highways, joined in making an order at the sessions in a matter which concerned his office, the court quashed the order(*e*). So, where a churchwarden, being also a magistrate, made a complaint of the chargeability of a pauper and then adjudicated in his character of magistrate upon his own complaint as churchwarden and made an order of removal, the court quashed the order(*f*). A justice of the peace rated to the poor-rate has been held incompetent to make an order for the removal of a pauper from his own parish on the ground of interest(*g*). But the 16 Geo. 2, c. 18, enables justices within their jurisdiction to do all acts appertaining to their office as justices relating to the laws for the relief, etc., of the poor, notwithstanding they are rated to or chargeable with poor-rate, etc., but no such justice is (s. 3) to act in the determination of any appeal to the quarter-sessions from any order relating to the place where he is taxed or chargeable.

But where magistrates are acting strictly in the discharge of a public duty in ordering a prosecution to be instituted and have no private object to serve, they are not disqualified from adjudicating upon the prosecution or complaint which they have themselves directed to be preferred(*h*). A somewhat analogous case is where they have directed a charge to be brought against the clerk of the peace for

(*c*) Reg. *v.* Allen, 33 Law J., M. C. 98. Rex *v.* Hoseason, 14 East, 608. Where a justice of the peace commences an action before himself in the name of a third person, to collect the amount of a note of which he is himself the owner, renders judgment by default, issues execution against the maker, and causes him to be arrested and imprisoned on the execution, he will be liable in trespass for such arrest and imprisonment. Dyer *v.* Smith, 12 Conn. 384.

(*d*) Per Holt, C.J., Anon. 1 Salk. 396.

(*e*) Foxham Tithing case, 2 Salk. 607.

(*f*) Rex *v.* Gt. Yarmouth, 6 B. & C. 650.

(*g*) Rex *v.* Gt. Chart, Burr. S. C. 194; 2 Str. 1173. And see Rex *v.* Gudridge, 5 B. & C. 459; Overseers of Washington *v.* Overseers of Beaver, 3 Watts & Serg. 548.

And where a justice of the peace, in bastardy proceedings, commenced by his father-in-law who was overseer of the poor, associated another justice with himself, and the two justices, after the usual proceedings, made an order of affiliation, and committed the party charged to jail for neglect to comply with the order, it was held that the overseer was a party to the proceedings in such a sense that the proceedings were void and the justices liable to an action for false imprisonment. Rivenburgh *v.* Henness, 4 Lans. (N. Y.) 208.

(*h*) Pettimangin, *Ex parte*, 33 Law J., M. C. 99 n.

misdemeaning himself in his office (within 1 W. & M. c. 21, s. 6), and have themselves heard the charge and dismissed the clerk(*i*). And in cases where a contempt of court is supposed to have been committed it becomes the unfortunate duty of the court to act both as party and judge, and to decide whether it has been treated with contempt(*k*). Therefore, where words are spoken in the presence and hearing of a justice of the peace reflecting upon him in the execution of his office; if he is to his face called a rogue and a liar, the justice may make himself both party and judge, and punish the offender immediately(*l*). So, if he be assaulted, he may at once commit the offender for trial; or if he be abused to his face in the execution of his office, he may commit the party until he finds sureties for his good behavior(*m*). If, however, the magistrate himself begins a breach of the peace, he forfeits the protection of the law in the execution of his office(*n*).

Although any direct pecuniary interest, however small, in the subject of inquiry disqualifies a person from acting as judge, the mere possibility of bias in favor of one of the parties will not have that effect. Where, therefore, two justices after due inquiry gave a certificate that a certain reservoir had been completed by the corporation of a borough, which certificate was necessary before the corporation could compulsorily take water to fill the reservoir, and the effect of such certificate thus necessarily improved the corporation property as a security for money borrowed, and a hospital of which the justices were trustees had lent money on the security of such property, it was held that the interest of such justices, as trustees only, was not sufficiently direct to invalidate their certificate(*o*). And if the magistrate has no interest in the matter at the time that the order is made, the fact that he subsequently becomes interested will not invalidate the order(*p*).

By 30 & 31 Vict. c. 115, a justice is not incapable of acting on the trial of an offence under a statute to be put into execution by a municipal corporation, local board of health, improvement commissioners, trustees, or any other local authority, by reason only of his being one of several ratepayers or other class of persons liable, in common with others, to be benefited by any fund, to which the penalty payable for

(*i*) Wildes *v.* Russell, L. R., 1 C. P. 722.
(*k*) Ld. Denman, C.J., in Carus Wilson's case, 7 Q. B. 1015.
(*l*) Rex *v.* Revel, 1 Str. 421. State *v.* Johnson, 1 Brevard, 155. And see Furr *v.* Moss, 7 Jones' Law (N. C.), 525.
(*m*) Dalt. Just. c. 173.
(*n*) R. *v.* Symonds, Ca. Temp. Hardwicke, 240.
(*o*) Reg. *v.* Rand, L. R., 1 Q. B. 230. See Reg. *v.* Manch. & Sheff. Rail. Co., *ante*, p. 778.
(*p*) Reg. *v.* Surrey Justices, 21 Law J., M. C. 198.

such offence is to be carried, being thereby increased, or to contribute to any rate, etc., in diminution of which such penalty will go.

If the magistrate, being disqualified by interest or otherwise, remains on the bench and takes any part at all in the proceedings, his presence will vitiate them(*q*). If he remains he should give a public notice that he is there merely as a spectator, and will not take any part in the adjudication of the matter(*r*).

969 *Wrongful commitment and imprisonment by justices.*—A magistrate is not at liberty to detain a known person to answer a charge not yet made against him; he ought to have an information regularly before him (*post*, p. 836), that he may be able to judge whether it charges any offence which the person ought to answer. It may be otherwise in the case of a mere vagabond, who, if he were once allowed to depart from the presence of the magistrate, would, probably, never be seen again(*s*).

In an action against a magistrate for an assault and false imprisonment, it appeared that the plaintiff had been summoned, and had appeared before the magistrate to answer a complaint of having unlawfully killed a dog; that the magistrate proposed an arrangement which was rejected by the plaintiff, upon which the magistrate told him that, unless he paid a certain sum of money, he should convict him in a penalty of that amount, and commit him to prison; that he then called in a constable, and ordered him to take the plaintiff outside, and if the matter was not settled to bring him in again, when he would proceed to commit him; and that the plaintiff then went out with the constable and settled the affair by paying a sum of money. It was held that the magistrate was guilty of an assault and false imprisonment, and was responsible in damages, as there was no evidence of any conviction, and he had no right to give the plaintiff into the hands of a constable, in order to drive him into a settlement of the complaint(*t*).

Where constables have arrested a man, and are taking him before a magistrate for the purpose of inquiring into a charge, it is not competent for a magistrate who meets them in the street to order the constables to take the man back to gaol, and keep him in prison. "It is a magistrate's duty," observes Patteson, J., "on all occasions, either to

(*q*) Reg. v. Suffolk Justices, 21 Law J., M. C. 169. Reg. v. Hertfordshire Justices, 6 Q. B. 753. Rivenburgh v. Henness, 4 Lans. (N. Y.) 208.

(*r*) Reg. v. Herefordshire Justices, 2 D. & L. 500 n.

(*s*) Per Ld. Tenterden, C.J., Rex v. Birnie, 1 Mood & R. 160; 5 C. & P. 206.

(*t*) Bridgett v. Coyney, 1 M. & Ry. 215.

examine into a charge, or, if there is a reason why he cannot examine into it, he is not to interfere at all, and he should let the constable take the party before some other magistrate. It would be a very fearful thing, indeed, if any magistrate is at liberty, meeting a man in custody of the constables in the street, to say, 'Take him back for twenty-four hours, and bring him up to-morrow'"(*u*).

970 *Acts of a justice of the peace who has not duly qualified* are not absolutely void; and, therefore, persons seizing goods under a warrant of distress, signed by a justice who has not taken the oaths at the general sessions, nor delivered in the certificate required, are not trespassers. Many persons acting as justices of the peace in virtue of offices of corporations, have been ousted of their offices from some defect in their election or appointment; and although all acts, properly corporate and official, done by such persons are void, yet acts done by them as justices, or in a judicial character, have in no one instance been thought invalid(*x*).

971 *Of the form of commitment.*—A commitment by way of punishment, by word of mouth only, without warrant in writing, cannot be supported(*y*). The commitment should be in writing, under the hand and seal of the justice by whom it is made, and should set forth his office and authority on the face of it, and the time and place at which it is made; also the cause of the commitment, and the period of the imprisonment. A commitment for an indefinite period cannot be supported(*z*). It need not be immediately made out; the detention of the person during the time necessarily required to make it out would be justifiable, but it should be made out as soon as possible. A commitment is in no respect like a conviction, which is only an entering on parchment the proceedings of a court which have already taken place, like recording a judgment(*a*).

Statutory forms of warrants of commitment are given by 11 & 12 Vict. c. 42, and it is enacted (ss. 9, 10), that no objection shall be taken or allowed to any summons or warrant against a party accused for any defect therein in substance or in form, or for any variance

(*u*) Edwards *v.* Ferris, 7 C. & P. 542. See Pratt *v.* Hill, 16 Barb. 303.

(*x*) The Margate Pier Company *v.* Hannam, 3 B. & Ald. 271. In order to justify an arrest and imprisonment by one assuming to act as a justice of the peace, he must show himself to have been at the time not only a justice *de facto* but *de jure*. Newman *v.* Tiernan, 37 Barb. 150. He cannot justify, unless before the arrest he had taken the requisite oath of office. Courser *v.* Powers, 34 Vt. 517. See State *v.* Carroll. 38 Conn. 449; Laver *v.* McGlachlin, 28 Wis. 364.

(*y*) Mayhew *v.* Locke, 7 Taunt. 69.

(*z*) Prickett *v.* Gratrix, 8 Q. B. 1029.

(*a*) Hutchinson *v.* Lowndes, 4 B. & Ad. 121. Leary *v.* Patrick, 15 Q. B. 274.

between it and the evidence adduced on the part of the prosecution before the justice who has taken the examination of the witnesses; but if any such variance shall appear to the justice to have deceived or misled the accused, the justice, at the request of the party charged, may adjourn the hearing to some future day, and in the meantime remand the accused, or admit him to bail.

972 *Commitment by justices of accused persons for trial—Examination of the witnesses.*—By 11 & 12 Vict. c. 42, s. 17, it is enacted, that in all cases where any person shall appear or be brought before any justice of the peace, charged with any indictable offence, the justice, before he commits the accused person for trial, or admits him to bail, shall, in the presence of such accused person, who is to be at liberty to put questions to any witnesses produced against him, take the statement on oath or affirmation of those who know the facts and circumstances of the case, and shall put the same into writing, and such depositions shall be read over to, and signed respectively by, the witnesses who shall have been so examined, and also by the justice or justices taking the same, and shall afterwards be delivered to the proper officer of the court in which the trial is to be had (s. 20); and before the first sitting of the court at which the person committed or bailed is to be tried, such person shall be entitled to have, from the officer or person having custody of the same, copies of the depositions on which he shall have been committed or bailed, on payment of a reasonable sum (s. 27). If the depositions when taken contain no charge of any indictable offence, oral evidence given before the justice, but not contained in the depositions, cannot be brought in aid of the depositions, to support the proceedings of the magistrate, and establish a valid information and the requisite jurisdiction(*b*).

973 *Effect of the depositions being taken in the absence of the magistrate who acts upon them.*—Every magistrate taking the depositions on oath of a party making the charge has a discretion to exercise; he is to examine the witness, hear his answers, and judge of the manner in which they are given, and to determine in many cases whether bail can or shall be taken. If, therefore, the depositions are taken by the

(*b*) Lawrenson *v.* Hill, 10 Ir. Com. Law Rep. 185. It has been held, however, in an action for a malicious prosecution, that oral evidence is admissible to add to or explain the examination of the defendant before a magistrate, though the examination was taken down in writing, and that anything the defendant may have said as part of his information beyond what was put into writing may be proved. Venafra *v.* Johnson, 1 M. & Rob. 316, for "what a party says in evidence *against* himself whether another person took it down or not." Alderson, B., in Robinson *v.* Vaughton, 8 C. & P. 255. But the writing must be produced, to see what it contains, before questions can be asked respecting matters which it does not contain.

magistrate's clerk in the absence of the magistrate, and the magistrate proceeds to act upon depositions so taken, he acts entirely without jurisdiction: there is no proper charge before him, and if he directs the imprisonment of the person accused by them he is responsible for a trespass(*c*).

The magistrate is not answerable for the correctness of the charge, or for any erroneous judgment of his own upon the facts. "The only question is, whether the magistrate had jurisdiction to investigate and commit"(*d*).

974 *Convictions by magistrates on their own view.*—A conviction before a justice or justices of the peace, without the intervention of a jury, is always, as we have seen, under some statute, the common law sanctioning no such proceeding. It is regarded by the courts with no particular favor, and it is necessary that the justice should, on the record of it, show that he has proceeded *recto ordine*(*e*). In some cases, and under particular Acts of Parliament, a summary remedy is provided, as we have seen, for particular offences, by enabling a magistrate to convict and punish upon his own view of the commission of the offence, whithout making any inquiry upon oath or taking any information(*f*). The record of the proceedings in such cases need only set forth such circumstances as were necessary to give the magistrate jurisdiction, and show that he pursued the directions of the statute(*g*).

975 *Summary convictions founded upon informations.*—When the magistrate has not been authorized by statute to act upon his own view, he must have some information or complaint before him in order to give him jurisdiction in the matter. He may have jurisdiction over the offence in the abstract, but to give him jurisdiction in any particular case over a particular individual, there must be a proper charge or information before him(*h*). If, therefore, he grants a warrant against a person upon a supposed charge of felony, without taking any deposition or information on oath, and the party is arrested under the warrant, this is a trespass, for which an action may forthwith be maintained against such justice for compensation in damages(*i*). So, if he makes an order for the removal of a pauper, without having

(*c*) Caudle *v.* Seymour, 1 Q. B. 892.
(*d*) Mills *v.* Collett, 6 Bing. 92. Windham *v.* Clere, Cro. Eliz. 180; 1 Leon. 187.
(*e*) 1 Smith's L. C., note to Crepps *v.* Durden, 6th ed.
(*f*) Jones *v.* Owen, 2 D. & R. 602.
(*g*) Basten *v.* Carew, 3 B. & C. 649.
(*h*) Caudle *v.* Seymour, 1 Q. B. 892.
(*i*) Morgan *v.* Hughes, 2 T. R. 225.

before him a complaint by the parish officers of the chargeability of such pauper to the removing parish, he acts wholly without jurisdiction in the matter, and is a trespasser(*k*).

976 *Statutory provisions respecting summary convictions and orders of justices.*—By 11 & 12 Vict. c. 43, s. 1, it is enacted, that in all cases where an information shall be laid before one or more of Her Majesty's justices of the peace for any county, riding, division, liberty, city, borough, or place, that any person has committed, or is suspected to have committed, any offence or act within the jurisdiction of such justice, etc., for which he is liable, upon summary conviction, to be imprisoned or fined, or otherwise punished, and also in all cases where a complaint shall be made to any such justice, etc., upon which he has authority to make any order for payment of money, it shall be lawful for the justice, etc., to issue his summons, stating shortly the matter of the information and complaint, and requiring the accused party to appear and answer, and be further dealt with, in manner therein provided.

977 *Requisites of the information or complaint.*—By s. 8 it is further enacted, that in all cases of complaints upon which a justice of the peace may make an order for the payment of money or otherwise(*l*), it shall not be necessary for the complaint to be in writing, unless it shall be required to be so by some particular Act of Parliament upon which it is framed; and (s. 10) that every complaint upon which a justice of the peace is authorized by law to make an order, and every information for any offence or act punishable upon summary conviction, unless some particular Act of Parliament shall otherwise require, may be made or laid without any oath or affirmation being made of the truth thereof, except in cases of informations, where the justice receiving the same shall thereupon issue his warrant in the first instance to apprehend the defendant; and in every such case the matter of such information shall be substantiated by the oath or affirmation of the informant, or by some witness on his behalf, before any warrant shall be issued.

Every such complaint must be for one matter of complaint only, and every such information for one offence only, and every complaint or information may be laid or made by the complainant or informant in person, or by his counsel or attorney, or other person authorized in that behalf; and must disclose upon the face of it some offence,

(*k*) Reg. v. Justices of Bucks, 3 Q. B. 807.
(*l*) See Sweetman v. Guest, *post*, p. 838.

neglect, or default, into which the magistrate has authority to inquire, and respecting which he has jurisdiction to adjudicate(*m*).

When a warrant is intended to be issued on the strength of the information, the information must, in order to give the justice jurisdiction in the matter, disclose a complaint about something that the justice has authority to inquire into and adjudicate upon, and the facts necessary to show jurisdiction must be substantiated on oath. An information on oath laid before a magistrate, charging an offence within his cognizance, is sufficient to give the magistrate jurisdiction over the charge and the person charged, although the information does not disclose any legal evidence of the guilt of the prisoner, and states nothing beyond mere hearsay, upon which neither judges nor juries could properly act. The commitment by the magistrate of a person to gaol upon the strength of such an information amounts at the utmost to no more than an error in judgment on the part of the magistrate, for which, if acting within his jurisdiction, he is not liable(*n*). But the information must impute a criminal offence within the jurisdiction of the magistrate, and not a mere civil wrong, in respect of which he has no jurisdiction(*o*).

978 *Of the time within which the information or complaint must be laid.*— By s. 11, it is further enacted, that in all cases where no time is specially limited for making or laying any such complaint or information, such complaint or information shall be laid within six calendar months from the time when the matter of such complaint or information arose. This limitation as to time being entirely distinct from the enactment creating the offence, and there being a *primâ facie* jurisdiction, until it is shown that the period of limitation had expired at the time of the laying the information, the limitation need not be noticed, and it need not be shown on the face of the proceedings that they had been originated within the appointed period. "All that is matter of defence, and need not be noticed in the conviction"(*p*). "Such" complaint refers to the provisions of s. 8, and is limited to cases mentioned in that section, viz., orders for the payment of money. It does not, therefore, refer to warrants of distress for non-payment of rates(*q*).

(*m*) Lawrenson *v.* Hill, 10 Ir. Com. Law Rep. 185. Reg. *v.* Scotton, 5 Q. B. 499. Perham, *In re*, 5 H. & N. 30.
(*n*) Cave *v.* Mountain, 1 M. & Gr. 257.
(*o*) Lawrenson *v.* Hill, *supra*.
(*p*) Wray *v.* Toke, 12 Q. B. 507.
(*q*) Sweetman *v.* Guest, L. R., 8 Q. B. 262.

979 *Proceedings upon information or complaint.*—By the same statute, provision is made for the service of the summons and for the proof of service thereof, and (s. 2) for the issue of a warrant for the apprehension of the party summoned in case of his non-appearance, according to the exigency of the summons; and also for the issue, in the first instance, in certain cases, of a warrant for apprehending the person against whom the information has been laid, and bringing him up to answer thereto, and to be dealt with according to law. Power is also given to justices under various statutes to issue summonses, and, in default of appearance, warrants, for the apprehension of material witnesses(*r*), and to issue warrants for the apprehension of parties who have been duly summoned to appear before them, and have failed to appear according to the exigency of the summons(*s*).

Where the statute creating the offence directs the issue of a summons, and gives the party summoned a certain time to appear and plead, there will be a clear want of jurisdiction, if the justices proceed to hear the complaint before the expiration of the full period allowed(*t*).

There must be some evidence before the magistrate of the commission of the particular offence charged in the information or complaint in order to justify a conviction upon it(*u*).

If a person is summoned before a magistrate for an offence under a particular statute, and appears to answer the charge stated in the summons, he cannot be lawfully convicted on a charge, although an analogous one, under a different statute(*v*); nor, if the evidence fails to substantiate the particular charge specified in the summons, can the summons be altered or amended so as to alter the nature of the offence originally charged, and to answer which the party has appeared(*w*); a magistrate cannot justify a commitment for one offence by a conviction for another and different offence(*x*); but if the accused party or his attorney appears before the magistrate and cross-examines the witnesses, and makes no objection to his proceeding until after the case for the prosecution has closed, he cannot then object to the

(*r*) 11 & 12 Vict. c. 42, s. 16; 11 & 12 Vict. c. 43, s. 7.
(*s*) 24 & 25 Vict. c. 97, s. 62; 11 & 12 Vict. c. 43, s. 13.
(*t*) Mitchell *v.* Foster, 12 Ad. & E. 475.
(*u*) Kirkin *v.* Jenkins, 32 Law J., M. C. 141. Sherborn *v.* Wells, 3 B. & S. 784. Evans *v.* Botterill, ib. 787.
(*v*) Reg. *v.* Brickhall, 33 Law J., M. C. 156.
(*w*) Martin *v.* Pridgeon, 1 Ell. & Ell. 778; 28 Law J., M. C. 179.
(*x*) Rogers *v.* Jones, 3 B. & C. 413.

hearing and adjudication on the ground that no information had been laid, or that the accused had not been duly summoned to answer the particular charge(*y*). Magistrates cannot give themselves jurisdiction by voluntarily shutting their eyes to one part of the charge and adapting it to a charge of some other offence, for the purpose of giving themselves jurisdiction(*z*). Every accused person must of course be heard in his own defence before he can lawfully be convicted(*a*).

980 *Unlawful proceedings of justices when there is no information or complaint before them.*—Magistrates have no jurisdiction to convict summarily and impose a fine for an assault, when it is an established fact that a complainant before them does not complain of the assault, and does not intend to give them jurisdiction to deal with it. Therefore, where a person who had been assaulted went before magistrates to have the assaulting party bound over to keep the peace, and the magistrates, finding that an assault had been committed, proceeded to deal with the assault by summary conviction, notwithstanding a protest by the complainant against their deciding on the assault, it was held that the justices had acted without any jurisdiction in the matter, the assault not having been brought before them with a view to their adjudicating upon it, and a rule for a certiorari to remove and quash the conviction was made absolute, in order that the conviction might be no bar to ulterior proceedings by indictment or by action(*b*).

981 *When a complaint once made cannot be settled and withdrawn.*—Where, however, a complaint of any crime or misdemeanor, or other statutory offence, has been duly laid before a magistrate, it does not rest with the complainant himself to abandon the charge, or to proceed further with the prosecution. Thus, where a complaint of an assault was duly laid before justices, and a summons issued for the appearance of the defendant, and the defendant went and settled the matter with the complainant by paying him a sum of money, and the complainant told one of the justices that the affair was settled, and that he did not intend to prosecute, but the justices nevertheless issued warrants for the apprehension of the parties, and compelled the complainant under the exigency of a warrant to appear and give evidence, and then convicted the defendant, it was held that the justices had not exceeded their authority, for the original complaint gave them jurisdiction in the

(*y*) Turner *v.* Postmaster-Gen., 34 Law J., M. C. 11.
(*z*) Thompson, *In re*, 6 H. & N. 193; 30 Law J., M. C. 19.
(*a*) Cooper *v.* Wandsworth Board, etc. 32 Law J., C. P. 185; *post*, ch. 28..
(*b*) Reg. *v.* Deny, 20 Law J., M. C. 189; 2 L. M. & P. 230.

matter, and the complaint having been made before them, they were justified in exercising all the powers vested in them by law for the purpose of enabling them to investigate it, and adjudicate upon it; and that it was not competent to the complainant to deprive them of jurisdiction by settling the matter with the accused party(*c*).

982 *Convictions by justices in excess of their jurisdiction.*—Where there is no evidence at all before justices of the facts necessary to give them jurisdiction, they cannot lawfully adjudicate or convict(*d*). Where the nature of the offence is such that it can only be committed once on the same day by the same person, and the magistrate proceeds to hear and convict, he is *functus officio*, and has no power to entertain or adjudicate upon a charge of a second offence on the same day by the same person. Thus, where a magistrate convicted a baker in four separate penalties for exercising his ordinary calling by baking rolls on a Sunday, and there were four separate convictions for selling four rolls, upon which the magistrate issued four distress-warrants, it was held that the magistrate, after he had convicted the baker in the first penalty, had no jurisdiction to convict him again for the same offence on the same day. "The Act of Parliament," observes Lord Mansfield, "gives authority to the justice to punish a man for exercising his ordinary calling on a Sunday. The justice exercises his jurisdiction by convicting him in the penalty for so doing. But then he has proceeded to convict him for three other similar offences on the same day. Now, if there are four convictions for one and the same offence, committed on one and the same day, three of them must necessarily be bad"(*e*). So, *e converso*, a single conviction for several distinct offences is bad, and if a distress issue to levy the penalty imposed, trespass will lie against the justices(*f*). But the swearing a profane curse several times repeated may constitute one offence only, although it subjects the swearer to a cumulative penalty of a certain sum for each oath(*g*).

983 *Ouster of the jurisdiction of justices by setting up a claim of title.*—Whenever a criminal statute authorizes justices to punish trespassers on land, a wilful trespass is intended, and not an entry on land in the *bonâ fide* assertion of some legal right or title. Whenever, therefore, in summary proceedings before magistrates, a *bonâ fide* claim of title to real property, or to the possession of some incorporeal right or privi-

(*c*) Reg. *v.* Hawkins, 2 N. R. 62.
(*d*) Reg. *v.* Johnson, 34 Law J., M. C. 86.
(*e*) Crepps *v.* Durden, Cowp. 465.
(*f*) Newman *v.* Bendyshe, 10 A. & E. 11.
(*g*) Reg. *v.* Scott, 33 Law J., M. C. 15.

lege over land, is set up before justices by a defendant in answer to some complaint of trespass, the jurisdiction of the justices in the matter is ousted, and the information or complaint ought to be dismissed(*h*). But the complaint ought not to be dismissed on the strength of the mere assertion of the claim, for it is the duty of the justices to inquire into the circumstances, and ascertain whether there is any plausible or colorable ground for the claim, and whether the act was done in the *bonâ fide* exercise of what the defendant supposed to be his right in the matter(*i*). When the defendant sets up some pretended right, which is unknown to the law, or some impossible claim, the title to property cannot be said to come in question. Thus, where a man, in answer to an information under the Game Act, set up a right of shooting in gross, which he alleged he had acquired by a forty years' user as of right, it was held that the justices were right in disregarding the claim, as the acquisition of such an easement in gross was an impossibility in point of law(*j*). The mere belief of the party himself that he has the right he asserts is not sufficient, under the Trespass in Pursuance of Game Act (1 & 2 Wm. 4, c. 32, s. 30), or the Larceny Consolidation Act (24 & 25 Vict. c. 96, s. 24),(*jj*) to oust the justices of their jurisdiction, as it might under the Malicious Trespass Act(*k*). Whenever a question of title is raised before them, and there is fair and reasonable evidence in support of it, the justices ought not to proceed, for they cannot themselves decide whether the claim is well or ill-founded in fact, although, if it can have no foundation in law, they may disregard it as above stated. Whenever a real question is raised between the parties as to the right, the justices ought not to convict(*l*).

Upon a question of highway arising before justices under the Highway Act, no matter of title comes in question, although the information or complaint is laid against the owner of the land who disputes the existence of a highway across his land(*m*).

The jurisdiction of justices, under the 1 & 2 Vict. c. 74, for facilitating the recovery of possession, by landlords, of premises held over by

(*h*) Reg. *v.* Cridland, 7 Ell. & Bl. 867; 27 Law J., M. C. 28. R. *v.* Burnaby, 2 Ld. Raym. 900.

(*i*) Reg. *v.* Dodson, 9 Ad. & E. 712. Morden *v.* Porter, 7 C. B., N. S. 641. Reg. *v.* Cridland, *ut sup.* Legg *v.* Pardoe, 30 Law J., M. C. 108. Leatt *v.* Vine, ib. 207. Eversfield *v.* Newman, 4 C. B., N. S. 418.

(*j*) Cornwell *v.* Sanders, 32 Law J., M. C. 6. Hudson *v.* Mac Rae, 33 Law J., M. C. 65; 4 B. & S. 585. See Simpson *v.* Wells, L. R., 7 Q. B. 214.

(*jj*) White *v.* Feast, L. R., 7 Q. B. 353.

(*k*) Cornwell *v.* Sanders, Hudson *v.* Mac Rae, *ut sup.*

(*l*) Reg. *v.* Stimpson, 4 B. & S. 307; 32 Law J., M. C. 209.

(*m*) Williams *v.* Adams, 31 Law J., M. C. 109.

tenants, after the due determination of their tenancy, cannot be ousted by the tenant's setting up the title of some third party, under whom he claims to hold, for as soon as the tenancy is proved to the satisfaction of the justice, the tenant is estopped from disputing the title of his landlord, and no question of title can be raised between them(*n*).

Justices cannot, of course, give themselves jurisdiction by erroneously and capriciously deciding contrary to the truth upon the question upon which their jurisdiction depends(*o*). "Justices cannot give themselves jurisdiction by finding that as a fact which is not the fact"(*p*). Where, therefore, their jurisdiction depends upon whether the objection to the validity of a rate be *bonâ fide* or not, if there are facts before the justices tending to show that the objection is not *bonâ fide*, the justices are not responsible for an erroneous judgment upon those facts(*q*), but there must be some reasonable ground before them to warrant them in coming to that conclusion; if there is no such evidence, they act wholly without jurisdiction, and may become liable in trespass for their acts(*r*). Whenever the defendant, however, submits his case and objections to the decision of the magistrates, and invites them to decide upon them, and makes no objection to their jurisdiction until after they have heard and adjudicated, he is estopped from afterwards objecting to their decision, and the proceedings taken thereon(*s*).

984 *To what extent a justice of the peace is protected in the exercise of a discretionary power.*—Where justices have a discretionary power they must make a fair and reasonable use of their discretion, and cannot refuse to act, and decline performance of a duty imposed upon them, because they think the operation of an Act of Parliament unjust. Where therefore, justices were empowered to issue a distress-warrant, "if they should think fit," and circumstances were established showing it to be their duty to issue their warrant, but they declined to do so because they thought the law unjust, the court made a rule absolute against them, with costs(*t*).

By 11 & 12 Vict. c. 44, s. 4, it is enacted, that in all cases where a

(*n*) Rees *v.* Davies, 4 C. B., N. S., 56.
(*o*) Reg. *v.* Nunneley, 27 Law J., M. C. 261.
(*p*) Lawrence, J., in Welch *v.* Nash, 8 East, 403.
(*q*) Reg. *v.* Blackburn, 32 Law J., M. C. 41.
(*r*) Pease *v.* Chaytor, 1 B. & S. 658; 31 Law J., M. C. 1; 32 ib. 121. Reg. *v.* Huntsworth, 33 Law J., M. C. 131, *post*, s. 2.
(*s*) Reg. *v.* Salop, 29 Law, J., M. C. 39. All the above, except Welch *v.* Nash, are cases of church rates, for the enforcement of which all compulsory proceedings are abolished by 31 & 32 Vict. c. 109, unless they have been made under a statutable authority. See Rippin *v.* Bastin, L. R., 2 Adm. & Eccl. 336.
(*t*) Reg. *v.* Boteler, 33 Law J., M. C. 101.

discretionary power shall be given to a justice of the peace by any Act of Parliament, no action shall be brought against such justice for, or by reason of, the manner in which he shall have exercised his discretion in the execution of any such power. But for the justice to secure his exemption under this section, it is essential that he should be clothed with a legal authority to do the act concerning which he exercises his discretion. If he has no jurisdiction in the matter, he has no valid discretionary power, and is not within the exemption. The magistrate, moreover, must be acting judicially in the exercise of his discretion, for if he is merely determining upon the propriety or expediency of performing some mere ministerial function, and makes a wrong exercise of his discretion by doing what he has no legal authority to do, he cannot claim the statutory exemption. Where magistrates, for example, exercise their discretion as to the granting or withholding a distress-warrant to enforce payment of a rate, the existence of a valid rate and a legal liability to pay on the part of the person distrained upon, are essential to the magistrate's exemption from liability, unless the rate is a poor-rate, and they can shelter themselves under that part of s. 4 of 11 & 12 Vict. c. 44, which expressly exempts justices from actions in respect of the issues of warrants of distress for poor-rate against persons not liable to pay the rate (*post*, p. 854) (*u*). So when the discretion exercised by the magistrate respects the issuing of a distress-warrant to enforce the payment of money ordered to be paid by some third person, the validity of the order, and the legal liability to pay the money, are a preliminary condition to the magistrate's having any authority to act at all in the matter(*x*).

985 *Wrongful ministerial acts* by magistrates may render them liable to an action of trespass, although they may have had the power of hearing and determining on the facts necessary to empower them to do the ministerial act, and have exercised their judgment upon such facts prior to the performance of the ministerial act. Thus, where an Act of Parliament empowered the owners, occupiers, etc., of abbey-lands to make a rate for certain purposes upon the owners of such lands, and provided, that if any owner who had been rated should neglect or refuse to pay the rate after demand, then, upon proof thereof before a justice, the same should be levied by distress, the defaulter having been first duly summoned to appear and show cause for his neglect or refusal, and the plaintiff being rated, and refusing to pay, was sum-

(*u*) Pedley *v.* Davis, 30 Law J., C. P. 378.
(*x*) Newbould *v.* Coltman, 6 Exch. 201; 20 Law J., M. C. 149. See *ante*, p. 772.

moned before the defendant, and denied his liability, but failed to show cause for his refusal to the satisfaction of the defendant, who issued a distress-warrant, under which the plaintiff's good were seized, and the plaintiff then brought his action for a wrongful seizure, and proved that his land was not abbey-land, and that he was not liable to be rated, and recovered damages, it was held that the defendant could not shelter himself from liability on the ground that he was acting judicially when inquiring into, and determining upon, the facts made preliminary to the issue of the warrant. The statute, it was observed, gave the defendant no power to try the question of the plaintiff's claim from exemption from the rate, on the ground that his land was not abbey-land, or to inquire into the validity of the rate, or to adjudicate upon the liability to pay. He was directed to begin by inquiring whether the rated owner had refused to pay, not whether the rate was valid, and his inquiry and determination had reference to the discharge of a mere ministerial function, and were not of a judicial character(*y*).

986 So, where an Act of Parliament, 2 & 3 Vict. c. 84, s. 11, provided that, when any contribution from overseers of moneys required by a board of guardians should be in arrear, it should be lawful for justices, to summon the overseers to show cause, etc., and, after having heard the complaint, etc., to issue their distress-warrant for the recovery of such contribution, and, a distress-warrant having been issued under the above section, the overseers brought an action of trespass against the justices, it was held that, as the statute did not require any conviction, or order, or act of adjudication at all, but simply a warrant of distress for the levying of the sums legally due, the justices, in hearing and deciding upon the facts which were to guide them in the exercise of their discretion as to the issue or refusal of the warrant, were not acting in the discharge of any judicial functions, but were exercising their discretion respecting the performance of a mere ministerial duty, and that a valid order from the board of guardians, and a legal liability to pay on the part of the overseers, were essential to give the magistrates jurisdiction to act at all in the matter(*z*).

Convictions upon by-laws.—If a corporation or a local board exceed their powers in making a by-law, a justice exceeds his power in convicting upon it; and the allowance of the by-law by the Secretary of

(*y*) Pedley *v.* Davis, *supra*. May, *Ex parte*, 2 B. & S. 426; 31 Law J., M. C. 161. Reg. *v.* Higginson, 2 B. & S. 471. Pease *v.* Chaytor, *supra*.

(*z*) Newbould *v.* Coltman, 6 Exch. 189; 20 Law J., M. C. 149.

State does not prevent the Court of Queen's Bench from granting a certiorari for the purpose of bringing up and quashing the conviction(*a*). If the validity of a by-law, and the jurisdiction of a justice to convict upon it, depend upon the existence or non-existence of a particular fact, the justice cannot give himself jurisdiction by finding the existence of the fact, unless there is reasonable evidence before him to support his finding. It is open to the person convicted to show by affidavit that there was no evidence before the justice on which he was warranted in coming to the conclusion that the by-law was valid, and that he had authority to enforce it, because it shows that the justice has exceeded his jurisdiction(*b*). And if, upon the facts proved before the justice, and the circumstances under which the conviction took place, it appears either that the justice did not determine upon the validity of the by-law, but thought himself bound to enforce it whether valid or invalid, and the by-law is invalid, or if it appears that the justice came to a wrong conclusion in point of law in determining that the facts before him gave him jurisdiction, the court will correct his mistake and quash the conviction, for the "magistrate has no power to hear at all, or to convict, except in the case of a valid by-law"(*c*). But if there are facts before the justice warranting him in coming to the conclusion that he had jurisdiction in the matter, and he adjudicates accordingly, his decision cannot be impugned on the ground that there were other facts before him from which he ought to have drawn a contrary conclusion(*d*).

It is sufficient to support a conviction for a penalty under a by-law made by a railway company pursuant to the Railway Clauses Consolidation Act, 8 & 9 Vict. c. 20 (ss. 108–111) to prove that a copy of the by-laws was affixed at the stations where the defendant entered and where he left the train, although the 110th section directs that they shall be hung up at "every wharf or station," etc., and that no penalty shall be recoverable unless they shall have been "kept published in manner aforesaid"(*e*). Such by-laws are public documents within the meaning of the 14 and 15 Vict., c. 99, s. 13, and therefore provable by certified copy under that Act(*e*).

987 *Of the drawing-up of convictions and orders*(*f*).—If the justice or justices convict or make an order against the defendant, a minute or

(*a*) Reg. *v.* Wood, 5 Ell. & Bl. 49.
(*b*) Bailey's case, 3 Ell. & Bl. 618. Reg. *v.* Dickenson, 26 Law J., M. C. 204.
(*c*) Campbell, C.J., and Crompton, J., Reg. *v.* Wood, 5 Ell. & Bl. 57, 58.
(*d*) Bailey's case, *supra*.
(*e*) Motteram *v.* East. Co. Rail., 7 C. B., N. S. 58; 29 Law J., M. C. 59.
(*f*) See *ante*, p. 771.

memorandum thereof must then be made (11 & 12 Vict. c. 43, s. 14), and the conviction or order afterwards drawn up in form, and lodged with the clerk of the peace, to be filed among the records of the quarter-sessions. Any omission by the clerk of the justices to perform this duty may render the justices liable to have proceedings taken against them(*g*). The conviction may be drawn up in form at a future time, after it has been acted upon, and may then be exhibited to authenticate the proceeding and protect the magistrate(*h*).

988 *Disclosure of the authority and jurisdiction of justices on the face of their proceedings.*—"In the case of special authorities given by statute to justices or others acting out of the ordinary course of the common law, the instruments by which they act, whether warrants to arrest, commitments, or orders, or convictions or inquisitions, ought, according to the course of the decisions, to show their authority on the face of them, by direct averment or reasonable intendment. Not so the process of the superior courts, acting by the authority of the common law"(*i*). Every order of justices, therefore, should show on the face of it a complaint and an adjudication thereon(*j*). "I think," observes Coleridge, J., "that the rule is a good rule, and that it is right that the jurisdiction of a judge with limited powers should be shown upon the face of his proceedings; and if this is not done, it would not be known that the matter was *coram non judice*, and it is not fitting that jurisdiction should be established one way or the other by parol evidence"(*k*).

989 *Description of the offence or subject-matter of complaint.*—The nature of the offence concerning which the justice is to inquire and determine must be correctly stated, in order to show that the justice has jurisdiction over it. It should be described in the words of the statute creating it(*l*). Where an Act of Parliament made the *wilful* misapplication of parish money by a relieving officer a penal offence, to be inquired into and adjudicated upon by justices, and the information charged merely a misapplication of the parish money, not saying that it was wilful, it was held that it did not charge any offence cognizable by the justices, and that the conviction founded upon it could not be supported(*m*). And where an Act of Parliament made

(*g*) Hayward, *In re*, 3 B. & S. 546; 32 Law J., M. C. 89.
(*h*) Massey *v.* Johnston, 12 East, 81.
(*i*) Gosset *v.* Howard, 10 Q. B. 453.
(*j*) Labalmondiere *v.* Frost, 1 Ell. & Ell. 527. Lindsay *v.* Leigh, 11 Q. B. 465.
(*k*) Reg. *v.* St. George, Bloomsbury, 24 Law J., M. C. 49.
(*l*) Rex *v.* Speed, 1 Ld. Raym. 583. Smith, *Ex parte*, 27 Law J., M. C. 186.
(*m*) Carpenter *v.* Mason, 12 Ad. & E. 630.

it a penal offence, cognizable by justices, to expose for sale metal buttons marked gilt, "knowing the same not to be gilt with gold or plated with silver," and the information charged the act to have been done fraudulently and unlawfully, without saying "*knowingly*," it was held that there was no offence charged of which the justices had authority to take cognizance(*n*).

A description, in the conviction, of the offence, in the terms of the Act creating it, where it appears from the whole tenor and scope of the Act that more is necessary to be proved by the evidence in order to constitute the offence than is stated in express terms upon the face of the statute, is not a sufficient description(*o*). Where a statute enacted "that no conviction on this Act shall be set aside by any court for want of form, or through the mistake of any fact, circumstance, or other matter whatsoever, provided the material facts alleged in such conviction, and upon which the same shall be grounded, be proved to the satisfaction of the court," Lord Kenyon declared that he could understand the enactment so far as it regarded the procedings before courts of quarter sessions on appeal, but not as applied to proceedings removed into the Court of King's Bench. "On an appeal," observes his lordship, "the whole case is to be gone into; evidence is to be given to support the conviction, and then it may be known whether or not the material facts alleged in such conviction, and upon which the same shall be grounded, be proved to the satisfaction of *that court:* but when the conviction is removed here by certiorari, I do not understand how we can inquire into those facts. The great question here is, whether or not the material facts to constitute the offence be alleged in the conviction"(*p*).

990 *Of singling out the offender*—Although it is, generally speaking, sufficient, in describing an offence in a conviction, to follow the words of the Act creating the offence, yet it is always necessary to add such facts as show that the person convicted was a party to the offence so described(*q*). The conviction must single out the offender, and specify him by name, and therefore a conviction of "Harrison and Company" is a nullity, even against the party named. "We cannot tell upon the face of such a proceeding whether the delinquency of Harrison's partners who are not before the court may not have been

(*n*) Rex v. Jukes, 8 T. R. 536.
(*o*) Fletcher v. Calthorp, 6 Q. B. 880.
(*p*) Rex v. Jukes, 8 T. R. 540.
(*q*) Chaney v. Payne, 1 Q. B. 721.

imputed to him "(r). If the conviction convicts the offender of one or other of two offences in the alternative, it is bad(s).

991 *Description of the locality of the offence.*—It is a general rule, that all judicial acts exercised by persons whose judicial authority is limited as to locality must appear to be done within the locality to which the authority is limited. Justices, therefore, acting judicially, must appear to be acting *in* their jurisdiction, as well as *for* it; and those cases which seem at first sight to afford some ground for a different opinion, will be found on examination to be all cases in which the act done might be valid, though in point of fact done out of the jurisdiction(t). It is not sufficient to describe the justices as justices *in* the county, nor as as justices *for* the county; but if they are described as doing the act as "justices in and for the county," that will suffice. "For," observes Williams, J., describes the authority, "in" the place, in which the justices were when they made the order(u).

In convictions, the place for which the magistrates act must be shown, the offence must be set out, and either it must appear that the offence was committed within the limits for which the convicting magistrates are appointed, or facts must be stated which give them jurisdiction beyond those limits(x). It is not sufficient to affirm that the offence was committed within a locality over which they had jurisdiction as justices, without naming it(y). Even where justices followed a form of conviction prescribed by statute, which form did not set forth the place where the offence was committed, it was nevertheless held that the conviction was bad for not showing that the offence was committed at some place within the county of which they were justices(z). It is not in all cases sufficient, therefore, to follow a form given by statute(a).

Where a statute directs an act to be done by justices acting for the division, any justice of the county acting within the division is for this purpose a justice of the division(b).

992 *Orders and adjudications by justices* must show upon the face of them

(r) Rex v. Harrison, 8 T. R. 508.
(s) Rex v. Morley, 1 Y. & J. 221. Rex v. North, 6 D. & R. 146. See *ante*, p. 839, and Morris v. Ogden, L. R., 4 C. P. 687; 38 Law J., C. P. 329.
(t) Reg. v. Totness, 11 Q. B. 90. Reg. v. Crowan, 14 Ib. 221.
(u) Reg. v. Stockton, 7 Q. B. 527.
(x) Kite and Lane's case, 1 B. & C. 104. Rex v. Edwards, 1 East, 278. R. v. Chandler, 14 Ib. 274.
(y) Rex v. Johnson, 1 Str. 261.
(z) Rex v. Hazell, 13 East, 141.
(a) *Re* Peerless, 1 Q. B. 152.
(b) R. v. Price, Cald. 305 n.

that the justice had jurisdiction to make the order. "However high the authority may be, where a special statutory power is exercised, the person who acts must take care to bring himself within the terms of the statute. Whether the order be made by the Lord Chancellor or by a justice of the peace, the facts which gave the authority must be stated"(c). An order of justices under 11 Geo. 2, c. 19, s. 4, adjudging a person to pay double the value of goods fraudulently removed to prevent a distress, must show on the face of it that the person removing the goods was the tenant, and that the complainant was his landlord, or the bailiff, agent, or servant of such landlord, as otherwise it is not made to appear that the magistrates had any jurisdiction to make the order(d). There must be a distinct finding on the face of the order by the magistrates of all the facts necessary to constitute the offence, and to give the justices authority to deal with it(e). An order of justices, therefore, was quashed because it did not appear on the face of it that they were justices of the county or for the county, but only that they were residing in the county(f).

The mention of the name of the county in the margin of the instrument only proves that it was made by the justices for that county, but does not show that the act to which it relates was committed in the county(g); nor does it show that the justices were acting within the county at the time they made the order(h), unless the marginal note of the county is incorporated into the body of the order by words of reference, and the whole when read together shows upon the face of it that the justices making the order were justices of or for the county, and that they made it *in* the county. Where an order of justices was headed "Westmoreland to wit," and the justices were described in the body of the order as justices of the peace "in and for the said county," it was held that this could mean no other county than the county stated in the margin; that the reference to it made it part of the order, and that it sufficiently appeared that the order was made in the county by justices for the county(i). But where one county was named in the margin of the order and another in the body of it, and the justices omitted to state of which county they were justices, it was held that the jurisdiction was not shown, and that the order was bad(k) It is

(c) Coleridge, J., Christie v. Unwin, 11 Ad. & E. 379.
(d) Rex v. Davis, 5 B. & Ad. 554.
(e) Day v. King, 5 Ad. & E. 366.
(f) Rex v. Dobbyn, 2 Salk. 474.
(g) Rex v. Austin, 8 Mod. 310.
(h) Reg. v. St. George, Bloomsbury, 24 Law J., M. C. 49.
(i) Reg. v. Casterton, 6 Q. B. 512.
(k) Rex. v. Moor Critchell, 2 East, 66.

not sufficient to place the name of a county or of a borough in the margin of the order, and to state in the body of it that the order is made by justices having jurisdiction within and for the said county or borough, without stating or showing that the order itself was made by them within the county or the borough for which they were justices(*l*).

If a conviction and order, and adjudication thereupon made, are so worded as to impose a larger obligation than is imposed by the statute authorizing them, the conviction and order cannot be supported. A conviction, therefore, of several defendants, making each of them liable to be imprisoned until he has paid a penalty, and the costs and expenses of conveying not only himself but the other persons convicted to gaol, will be bad, unless the statute on which the conviction is founded expressly renders all the defendants liable to be imprisoned until the costs of conveying all to gaol have been paid(*m*).

993 *Statutory forms of convictions and orders* are given by 11 & 12 Vict. c. 43, s. 17. These forms begin with a marginal note of the county; and they record that on a certain day and year *within* the said county the offending party was convicted before the undersigned justices of the peace *for* the said county; they state the nature of the offence, the time and place when and where it was committed, and the adjudication and order thereupon made. In stating the offence, care must be taken to show that the offence or act is within the cognizance or jurisdiction of the justice who makes the conviction or order, and that the offence created by the statute upon which the proceedings are founded has been committed(*n*). The forms given by these statutes dispense with the necessity of setting out the information, the summoning of the defendant, the fact of his appearance or non-appearance, the evidence adduced against him, and the various details previously considered necessary to show that the magistrates proceeded *recto ordine*(*o*). "If justices substantially adopt the forms given by the statute, they do all that is required of them"(*p*). See *ante*, p. 849.

994 *Immateriality of mere surplusage.*—If proceedings before magistrates correctly describe the offence, and show when and where it was committed, and that the magistrate had jurisdiction over it, and over the individual charged with it, and contain all that is prescribed by statute to make them valid, they are not rendered invalid because they set

(*l*) Reg. v. Newton Ferrers, 9 Q. B. 32.
(*m*) Reg. v. Cridland, 27 Law J., M. C. 28.
(*n*) Reg. v. Johnson, 8 Q. B. 106.
(*o*) Wray v. Toke, 12 Q. B. 492.
(*p*) Allison, *In re*, 10 Exch. 563.

out the information, the summons, the defendant's appearance, the examinations of the witnesses, and a host of particulars which are not now required to be stated or set forth on the face of the proceedings. Where a particular form is required by statute, and the form actually used contains all that the statute requires, and a great deal more, the unnecessary addition does not necessarily invalidate the proceedings(*q*). But it will do so if the unnecessary addition renders the order or instrument substantially different from what is required by the statute(*r*).

995 *Effect of the conviction.*—So long as the conviction remains in force, it cannot be contradicted, nor the facts recorded therein be controverted(*s*); and it is a principle of law, that where justices of the peace have an authority given them by an Act of Parliament, and they appear to have acted within the jurisdiction so given, and to have done all that they are required by the Act to do to originate their jurisdiction, a conviction drawn up in due form and remaining in force is a protection in any action brought against them for the act so done, unless they have acted corruptly, and have convicted and granted a warrant maliciously, and without any reasonable and probable cause(*t*) (*post*, s. 2). And now, although the magistrate had no jurisdiction in the matter, and had no legal authority to make the conviction or order, the conviction is nevertheless conclusive, and protects him from an action until it has been quashed.

996 *Warrants of distress and commitment* must state the cause of the committal or distress(*u*). By 11 & 12 Vict. c. 43, s. 19, it is enacted, that where a conviction adjudges a pecuniary penalty to be paid, or where an order requires the payment of money(*v*), and by the statute authorizing the conviction or order such penalty, compensation, or sum of money is to be levied upon the goods and chattels of the defendant by distress and sale thereof, and also in cases where, by the statute in that behalf, no mode of levying the penalty, compensation, etc., is provided, it shall be lawful for the justices, etc., making the conviction or order, or for any justice of the peace for the same county, riding, division, etc., to issue a distress-warrant for the levying of the same in the mode therein provided, or, in case the defendant has no suffi-

(*q*) Rex. *v.* Jefferies, 4 T. R. 769.
(*r*) Rex. *v.* Priest, 6 T. R. 538.
(*s*) Strickland *v.* Ward, 7 T. R. 633 n.
(*t*) Basten *v.* Carew, 3 B. & C. 653.
(*u*) Lawrenson *v.* Hill, 10 Ir. C. L. R. 184.
(*v*) As to imprisonment in case of non-payment of penalties of 5*l.* and under, see The Small Penalties Act, 1865, 28 & 29 Vict. c. 127.

cient goods and chattels, to issue a warrant of commitment (s. 21). And it is enacted (s. 20), that in all cases where a justice of the peace shall issue any such warrant of distress, it shall be lawful for him to suffer the defendant to go at large, or verbally, or by a written warrant, to order the defendant to be detained in custody until return be made to such warrant of distress, unless security is given by recognizance or otherwise, to the satisfaction of such justice, for his appearance, etc. "It is to be remembered," observes Coleridge, J., "that such an imprisonment is not a part of the punishment under the conviction, but is a mere detention until the return of the warrant, in case there should be no distress. It is a power to imprison *quia timet*, extra the punishment, and such a power should be strictly pursued. Now, assuming that magistrates acting in the exercise of that power, have detained a party by parol commitment for an indefinite time (the warrant of distress not being returnable on a day certain), there is an excess of jurisdiction"(*x*). In all cases of commitment of persons to prison, the exact period of imprisonment must be stated on the face of the warrant, for "if it is left indefinite a man may be imprisoned for life"(*y*).

In all cases of convictions where the statute on which the same are founded provides no remedy, in case it shall be returned to a warrant of distress thereon, that no sufficient goods can be found, the justice to whom such return is made (s. 22), or any other justice for the same county, etc., may by his warrant, commit the defendant for any term not exceeding three calendar months, unless the sum adjudged to be paid, and all costs, etc. (the amount thereof being ascertained and stated in such commitment), shall be sooner paid. Provision is made (s. 23) for the issue of warrants of commitment for enforcing payment of penalties, and punishing (s. 24) disobedience of orders of justices. See 28 & 29 Vict. c. 127, *ante*, p. 852, n.

Where an imprisonment, warrant of justices, and seizure of goods thereunder, are all defended on the ground that there was an adjudication to pay costs, and there is no such adjudication, the warrant is illegal, and the imprisonment and seizure of the goods are wrongful, and an excess of jurisdiction(*z*).

By the 32 & 33 Vict. c. 62, arrest and imprisonment for debt are abolished with certain exceptions, one of which is "default in payment

(*x*) Leary *v.* Patrick, 15 Q. B. 274.
(*y*) Ld. Denman, C.J., Prickett *v.* Gratrex, 8 Q. B. 1029.
(*z*) Leary *v.* Patrick, 15 Q. B. 274.

of any money recoverable summarily before a justice or justices of the peace" (s. 4). Under these words it has been held that costs, awarded by the court of quarter sessions to one of the parties to an appeal, and which by certain Acts might be enforced before a justice by warrant of distress, and in default of distress by warrant of commitment, are within the exception(*a*).

997 *Exemption of justices from actions in respect of warrants of distress for poor-rate.*—By the 11 & 12 Vict. c. 44, s. 4, it is enacted, that where any poor-rate shall be made, allowed and published, and a warrant of distress shall issue against the person named and rated therein, no action shall be brought against the justice who shall have granted such warrant by reason of any irregularity or defect in the rate, or by reason of such person not being liable to be rated therein. See *ante*, pp. 843, 844.

998 *Warrants of distress and commitment in case of non-payment of costs by an informer or complainant.*—By 11 & 12 Vict. c. 43, s. 25, it is enacted, that where any information or complaint is dismissed with costs, the sum awarded for costs may be levied by distress on the goods of the prosecutor or complainant; and, in default of distress or payment, such prosecutor or complainant may be committed to prison for any time not exceeding one calendar month, unless such sum, and all costs and charges of the distress, and of the commitment, and conveying of such prosecutor or claimant to prison (the amount thereof being ascertained and stated in the commitment), shall be sooner paid.

999 *Service of a copy of the minute of the order before the issue of a warrant of commitment or distress.*—It is enacted also (s. 17), that in all cases where by Act of Parliament authority is given to commit a person to prison, or to levy upon his goods or chattels by distress, for not obeying any order of justices, the defendant shall be served with a copy of the minute of such order before any warrant of commitment or of distress shall issue, and such order or minute shall not form any part of such warrant of commitment or of distress. Wherever the interest of a person is to be affected by an order of magistrates, he ought to have an opportunity of contesting it(*b*).

1000 *The power of appeal to the court of quarter sessions against summary convictions and orders of justices* is not a matter of common right, but of special provision in particular statutes. It may be given either absolutely, or conditionally, and if no limit as to time be prescribed, the

(*a*) Reg. *v.* Pratt, L. R., 5 Q. B. 176.
(*b*) Reg. *v.* Totness Union, 7 Q. B. 699. Painter *v.* Liv. Gas Co., 3 Ad. & E. 443.

appeal must be brought within a reasonable time(*c*). A right of appeal cannot be implied, but must be given in express terms(*d*). Most statutes giving to justices a power of summary conviction, also give a right of appeal, and prescribe the time and mode of exercising the right; and some of them impose upon the convicting justice the duty of making known to the party convicted his right of appeal(*e*). Any person who thinks himself aggrieved by any summary conviction by borough justices, under the Municipal Corporation Act, may appeal to the court of quarter sessions in the manner therein provided(*f*). The procedure in cases of appeal to courts of quarter sessions is now mainly regulated by 12 & 13 Vict. c. 44, which prescribes fourteen clear days notice of appeal, and requires the grounds of appeal to be set forth in such notice; but the provisions in this statute relating to notices of appeal do not (s. 2) affect appeals against summary convictions, orders of removal, orders relating to pauper lunatics, orders in bastardy, or proceedings under statutes relative to the excise, customs, stamps, taxes, or post office.

1001 *Excess of jurisdiction may be made a ground of appeal* as well as an erroneous decision. But a person having a power of appeal is not bound to appeal where a magistrate has acted without jurisdiction. He is at liberty to treat the act as void, and to avail himself of all existing remedies at common law for obtaining satisfaction for the wrong done. Many recent statutes giving magistrates authority to make orders in certain cases for certain things to be done, but giving parties the power of appealing to the superior courts against the decision of such magistrates, do not in anywise abridge the controlling power of the Court of Queen's Bench, in cases where the justices have exceeded their authority, or have acted without authority. The power of appeal is given for the purpose of reviewing the decision of justices in cases where they had jurisdiction in the matter, but are supposed to have decided erroneously in point of law on the facts before them, or upon the merits. Where they had no jurisdiction to make the order, an aggrieved party is entitled to a writ of certiorari, to remove the order and quash it, just the same as if no power of appeal at all had been given(*g*).

(*c*) Lord Ellenborough, Rex v. Oxfordshire Just., 1 M. & S. 448. Rex v. Cashiobury Just., 3 D. & R. 35.

(*d*) Reg. v. Stock, 8 Ad. & E. 411.

(*e*) Paley on Summary Convictions, 5th ed., p. 340, *et. seq.*

(*f*) 5 & 6 Wm. 4, c. 76, s. 131.

(*g*) Birmingham Churchwardens, etc. v. Shaw, 10 Q. B. 880; 18 Law J., M. C. 89. Pedley v. Davis, 10 C. B., N. S. 492; 30 Law J., C. P. 379. And see *ante*, p. 777.

1002 *Of the execution of convictions and orders after notice of appeal.*—Some statutes giving an appeal against summary convictions expressly stay execution pending the appeal(*h*). From the 27th section of the 11 & 12 Vict. c. 43, it may be argued that, pending an appeal, justices are not at liberty to grant a warrant of execution, as they are expressly authorized to grant the warrant after the appeal is determined. But section 35 enacts that the Act shall not extend to any complaints, orders, or warrants in matters of bastardy, with certain exceptions. The pendency of an appeal, therefore, against an order on a putative father, and the granting of a case for the opinion of the Court of Queen's Bench, as to whether the order ought to be enforced, does not take away the jurisdiction of justices to issue a warrant in execution of the conviction, and to enforce payment of the money due under the order in the interim; for if the putative father could, as a matter of right, entirely escape all liability to contribute to the maintenance of the child pending the appeal, he might for three months allow the child to starve and oppress the mother, although he never meant *bonâ fide* to prosecute the appeal. "In a vast majority of cases, however," observes Lord Campbell, "it would be exceedingly improper in the justice to grant a warrant after notice of appeal had been given and recognizances entered into, and before the hearing of the appeal, or before the time for hearing it, has expired. And, acting from a corrupt motive, he might be liable to an action for maliciously granting it. But I do not think that in granting it he could be said to have acted without jurisdiction, and possibly, he might show that he had acted laudably in granting it. It might, on the other hand, be highly improper for the justice to try to enforce the order when the justices at quarter sessions had expressed a grave doubt as to its validity, and his doing so might be evidence of malice"(*i*).

1003 *Exemption of justices from liability where a defective conviction or order has been confirmed upon appeal.*—By the 11 & 12 Vict. c. 44, s. 6, it is enacted, that in all cases where a warrant of distress or warrant of commitment shall be granted by a justice of the peace upon any conviction or order, which either before or after the granting of such warrant shall be confirmed upon appeal, no action shall be brought against the justice who granted the warrant for anything which may have been done under the same by reason of any defect in such conviction or order.

(*h*) Reg. *v.* Aston, 1 L. M. & P. 491.
(*i*) Kendall *v.* Wilkinson, 4 Ell. & Bl. 680; 24 Law J., M. C. 89.

1004 *Statement of a case to the superior courts by way of appeal from decisions of justices.*—By 20 & 21 Vict. c. 43, it is enacted, that after the hearing and determining by justices of any information or complaint which they have power to hear and determine in a summary way(*k*), either party to the proceeding may, if dissatisfied with the determination as being erroneous in point of law, apply in writing within three days to the justices to state and sign a case, setting forth the facts and grounds of such determination, for the opinion thereon of one of the superior courts of law, to be named by the party applying(*l*). Notice in writing, with a copy of the case stated and signed, is to be given to the other party to the proceedings, and security is to be given(*m*) by the appellant to prosecute the appeal without delay, and to pay such costs as may be awarded (s. 3). If the justices refuse to state the case (s. 4), the appellant may apply (s. 5) to the court of Queen's Bench, upon an affidavit, for a rule calling upon the justices and the respondent to show cause why the case should not be stated; and if the rule is made absolute, the case is to be stated on the appellant's entering into the required recognizances.

Power is given to the superior courts to hear and determine cases sent up to them under this statute, and reverse, affirm, or amend the decision of the justices below, or send the case back (s. 7) for amendment, and to make all necessary orders in the matter. The authority and jurisdiction of the superior courts in the matter may (s. 8) be exercised by a judge at chambers, and after the decision of the superior court has been given, the order is to be enforced in the mode pointed out by the statute. "It is a very salutary practice," observes Lord Campbell, "for the recorder or justices to find the facts, and submit them to this court for us to decide whether the case was within the jurisdiction of the justices or not. That is much better than for the court to have to gather the facts from conflicting affidavits"(*n*).

1005 *Of the quashing of convictions and orders—Removal of orders and convictions by certiorari*(*o*).—The proceedings of all inferior courts of record are removable by certiorari, for the purpose of being examined by the Court of Queen's Bench, except where the writ of certiorari is ex-

(*k*) May, *Ex parte*, 2 B. & S. 428; 31 Law J., M. C. 161. Whether a warrant of distress for the non-payment of a rate is such a proceeding, *quære*? See Sweetman *v.* Guest, L. R., 3 Q. B. 262.

(*l*) The decision of a dispute referred to justices, under 21 & 22 Vict. c. 101 (as to friendly societies), is within the above Act. R. *v.* Lambarde, L. R., 1 Q. B. 388.

(*m*) See Stanhope *v.* Thorsby, L. R., 1 C. P. 423.

(*n*) Reg. *v.* Dickenson, 26 Law J., M. C. 204.

(*o*) See Chitt. Arch. Pr., 11th ed., tit. CERTIORARI; and *ante*, p. 777.

pressly taken away by statute(*p*); and even then the writ is not taken away, as we shall presently see, in those cases where inferior courts or magistrates have acted in a matter over which they had no jurisdiction, nor in cases where they have exceeded their jurisdiction, nor is it taken away by express prohibitory words when it is moved for on behalf of the crown. If there has been before the inferior court reasonable evidence from which that court could draw the conclusion that facts existed which would give them jurisdiction, and they have drawn that conclusion, the Court of Queen's Bench has no power to review their decision, and determine whether it was right or wrong(*q*). Where an order of justices confirming a conviction is void, on the ground of interest in the justices who made the order (*ante*, p. 830, *et seq.*), the Court of Queen's Bench will grant a certiorari to bring up the order for the purpose of quashing it, although the writ is taken away by statute, for a statutory clause taking away the writ must be understood to assume that the order has been made by proper authority, but that is not proper authority which is exercised by interested justices(*r*). If the order was made by a court of quarter sessions on appeal from justices in petty sessions, the Court of Queen's Bench will quash it, and grant a mandamus to compel the quarter sessions to enter continuances, and again hear the appeal(*s*). But a person who seeks to quash a conviction on the ground that the justices were personally interested, should make the objection at the time of the hearing, or show that both he and his attorney were ignorant of the fact at that time(*t*).

1006 *Decisions which are final, and cannot be reviewed by certiorari or mandamus.*—By 12 & 13 Vict. c. 45, it is enacted, that the decisions of courts of quarter sessions upon the hearing of any appeal, as to the sufficiency of the statement of any ground of appeal, and as to the amending, or refusing to amend, any order or judgment of justices appealed against, or the statement of any ground of appeal and as to the substitution of new recognizances, shall be final, and not liable to be reviewed in any court by means of a writ of certiorari or mandamus, or otherwise.

(*p*) Groenvelt *v.* Burwell, 1 Ld. Raym. 469. R. *v.* Moreley, 2 Burr. 1041. R. *v.* West Riding Justices, 34 Law J., M. C. 227.

(*q*) Blackburn, J., in *Re* Pater, 33 Law J., M. C. 151. Pease *v.* Chaytor, 33 Law J., M. C. 121.

(*r*) Reg. *v.* Hertfordshire Justices, 6 Q. B. 753. Reg. *v.* Chelt. Com., 1 Q. B. 467. See Rex *v.* Justices of Monm., 8 B. & C. 137.

(*s*) Hopkins, *Ex parte*, Ell. Bl. & Ell. 100.

(*t*) Reg. *v.* Ld. Huntingtower, 8 Cox Cr. C. 562. Reg. *v.* Chelt. Com., 1 Q. B. 474. Dimes *v.* Grand Junc. Canal Co., 3 H. L. C. 759.

1007 *Commitment for contempt.*—If an inferior court having power to commit or fine for contempt treats that as a contempt which there was no reasonable ground for so treating, the Court of Queen's Bench will interfere to protect the person subjected to an improper exercise of the power, but the court cannot take upon itself the functions of a court of appeal from the decision of the court below, and if there was any colorable ground for the exercise of its jurisdiction, the Court of Queen's Bench will not interfere with its judgment in the matter(*u*). A contempt of court being a criminal offence, no person can be punished for it, unless the specific offence charged against him be distinctly stated, and an opportunity given him of answering(*x*). See *ante*, p. 775.

1008 *When the writ of certiorari is not taken away by express statutory prohibition.*—The writ of certiorari is not taken away by express prohibitory or restraining clauses in cases where justices of the peace have acted without jurisdiction(*y*), or where there were no facts before them to give them jurisdiction, or where a summons has been granted under one statute, and the defendant is convicted under another(*z*), or where the decision has been made by a court improperly constituted, as where magistrates have acted in the execution of their office in matters and proceedings in which they were personally interested(*a*), or where it can be shown that the conviction has been obtained by fraud and collusion to defeat the law, or interfere with the pure administration of justice; for in all cases where the proceedings of courts of inferior jurisdiction are shown to have been a fraud and mockery, or the result of conspiracy and subornation of perjury, the court will exercise its jurisdiction as a court of control over inferior jurisdictions, and will interfere by certiorari and quash the proceedings, although it is expressly enacted that no certiorari shall be issued to remove them(*b*), "for fraud is an extrinsic collateral act, which vitiates the most solemn proceedings of courts of justice." Lord Coke says, "It avoids all judicial acts, ecclesiastical or temporal," and therefore the sentence of a spiritual court may be annulled by proving the same to have been obtained by fraud or collusion(*c*).

(*u*) Pater, *In re*, 33 Law J., M. C. 142.

(*x*) *Ex parte* Pollard, L. R., 2 Pri. Co. Ca. 106. See M'Dermott *v.* Judges of British Guiana, 38 Law J., P. C. 1; L. R., 2 P. C. Ca. 341.

(*y*) Rex *v.* Derb. Just., 2 Kenyon, 299. Reg. *v.* Warwick Just., 6 Ell. & Bl. 837. Reg. *v.* Badger, ib. 154. Reg. *v* St. Albans, 22 Law J., M. C. 142. See *ante*, p. 777.

(*z*) Reg. *v.* Brickhall, *ante*, p. 839.

(*a*) Reg. *v.* Cheltenham, 1 Q. B. 474. Reg. *v.* Aberdare Canal Co., 14 ib. 854.

(*b*) Reg. *v.* Gillyard, 12 Q. B. 527.

(*c*) Duchess of Kingston's case, 2 Smith's L. C. 679, 6th ed. See Patch *v.* Ward, L. R., 3 Ch. App. 203. Pearse *v.* Dobinson, L. R., 1 Eq. Ca. 241.

If a local board exceed their powers in making a by-law, and a justice convicts upon the strength of it, he exceeds his authority in so doing, and the conviction may be quashed on certiorari, although the statute authorizing the creation of the board and the making of the by-laws enacts that no proceeding touching the conviction of any offender shall be removable by certiorari; and the allowance of the by-law by the Secretary of State makes no difference, "for no power is given to him to legislate; he can only confer an authority on a by-law made conformably to the statute authorizing it to be made(*d*).

"It is a known rule," further observes Bayley, J., "that general words in an Act that no certiorari shall be allowed, or the like, will not bind the crown"(*e*), nor any private person prosecuting on behalf of the crown(*f*), for the king's prerogative cannot be taken away by Act of Parliament except by express words, and it is part of his prerogative to try his cause in what court he pleases(*g*). "If," observes Erle, J., "the use of the writ of certiorari were restored in all cases, for the purpose of raising questions of substance for the opinion of the court, it would be a salutary addition to the jurisprudence of this country"(*h*).

A certiorari will lie to remove judicial acts only. It will not be granted, therefore, to remove mere ministerial proceedings, such as a warrant to apprehend an offender, or a warrant of distress(*i*), or an order for the appointment of overseers(*k*).

1009 *Proof by affidavit of the facts and circumstances calling for the interference of the superior court.*—Although the proceedings before justices are all regular on the face of them, and disclose a case within the jurisdiction of the magistrates, yet the parties on either side may bring before the superior courts affidavits disclosing on the part of the magistrates the evidence on which they acted, and on the part of the defendant the evidence on which he relied before them, as well as other evidence affecting the merits not adduced before them, for the purpose of showing that the case was not within the jurisdiction of the magistrates. The superior court has no power to review the decision on the merits, and to reverse it on the ground that it was unwise or

(*d*) Reg. *v.* Wood, 5 Ell. & Bl. 55. Brown *v.* Local Board of Holyhead, 32 Law J., Exch. 25. R. *v.* Grey, L. R., 1 Q. B. 469.
(*e*) Rex *v.* Allen, 15 East, 342. Rex *v.* Davies, 5 T. R. 626.
(*f*) Reg. *v.* Spencer, 9 Ad. & E. 485.
(*g*) Rex *v.* Berkley, 1 Kenyon, 100.
(*h*) Reg. *v.* Dickenson, 26 Law J., M. C. 206.
(*i*) Rex. *v.* King, 2 T. R. 235. Rex *v.* Atkins, 4 Ib. 12.
(*k*) *Re* The Overseers of Pudding Norton, 33 Law J., M. C. 136.

unjust. All that it can do is to see that the case was within the jurisdiction of the magistrates who adjudicated upon it, and that their proceedings are on the face of them regular, and according to law(*l*).

"Magistrates," observes the court, "cannot, as it is often said, give themselves jurisdiction merely by their own affirmation of it(*m*). But it is obvious that this may have two senses: in the one it is true; in the other, on sound principle and on the best considered authority, it will be found untrue. Where the charge laid before the magistrate does not amount in law to the offence over which the statute gives him jurisdiction, his finding the party guilty, by his conviction in the very terms of the statute, would not avail to give him jurisdiction. If, the charge being really insufficient, the magistrate has misstated it in drawing up the proceedings, so that they appear to be regular, it would be clearly competent to the defendant to show by affidavits what the real charge was, and, that appearing to be insufficient, we should quash the conviction. Whenever a charge has been presented to the magistrate over which he has no jurisdiction, he has no right to entertain the question, or commence an inquiry into the merits, and his proceeding to a conclusion will not give him jurisdiction. But as in this latter case we cannot get at the want of jurisdiction but by affidavits, of necessity we must receive them. But where a charge has been well laid before a magistrate, on its face bringing itself within his jurisdiction, he is bound to commence the inquiry. In so doing he undoubtedly acts within his jurisdiction, but in the course of the inquiry, evidence being offered for and against the charge, the proper, or the irresistible, conclusion to be drawn, may be that the offence has not been committed, and so that the case in one sense was not within the jurisdiction. Now to receive affidavits for the purpose of showing this is clearly in effect to show that the magistrate's decision was wrong if he affirms the charge, and not to show that he acted without jurisdiction; for they would admit that, in every stage of the inquiry up to the conclusion, he could not but have proceeded, and that if he had come to a different conclusion, his judgment of acquittal would have been a binding judgment, and barred another proceeding for the same offence. Upon principle, therefore, affidavits cannot be received under such circumstances. The question of jurisdiction does not depend on the truth or falsehood of the charge, but upon its nature(*n*); it is determinable on the commencement, not at the con-

(*l*) Terry *v.* Huntingdon, Hardr. 480.
(*m*) Welch *v.* Nash, 8 East, 404.
(*n*) See *Ex parte* Vaughan; L. R., 2 Q. B. 114.

clusion, of the inquiry; and affidavits to be receivable must be directed to what appears at the former stage, and not to the facts disclosed in the progress of the inquiry"(*o*).

Affidavits may be used to show that there was no evidence before the justice of the facts necessary to give him jurisdiction in the matter, but if there were facts in evidence before the justice, from which it was reasonable to infer that he had jurisdiction, it cannot be shown that there was other evidence, from which the justice might reasonably have inferred the contrary; for that would only go to show that the finding of the justice on a matter within his jurisdiction was wrong. Thus, although an information under 4 Geo. 4, c. 34, for punishing certain classes of servants who have contracted to serve, and have refused to enter upon the service, or who have absented themselves therefrom without leave, or have misconducted themselves in such service, is good on its face, as showing that there was the requisite contract to serve, yet it is competent to an accused person to show that there was no evidence before the justice on which he was warranted in coming to the conclusion that there was any contract of service at all, and that there was nothing from which he could legally or reasonably infer that he had any jurisdiction in the matter(*p*).

If justices have proceeded to remove a pauper without any complaint by parish officers of the chargeability of such pauper, the fact may be shown by affidavit; for if there is no complaint, the magistrates have nothing before them in respect of which they can make an order, or exercise their magisterial functions(*q*).

1010 *Amendment of orders or judgments of justices on return to a certiorari.*—By 12 & 13 Vict. c. 45, s. 7, it is enacted, that if upon the return to to any writ of certiorari any objection shall be made, on account of any omission or mistake in the drawing up of an order or judgment of justices, and it shall be shown to the satisfaction of the court that sufficient grounds were in proof before the justices making such order, or giving such judgment, to have authorized the drawing up thereof free from the said omission or mistake, it shall be lawful for the court, upon such terms as to payment of costs as it shall think fit, to amend such order or judgment, and to adjudicate thereupon as if no such

(*o*) Reg. *v.* Bolton, 1 Q. B. 72. Thompson *v.* Ingham, 14 Q. B. 718. Thompson, *In re*, 30 Law J., M. C. 23. Penny, *In re*, 7 Ell. & Bl. 600; 26 Law J., Q. B. 225.

(*p*) Bailey's case, 8 Ell. & Bl. 618. Reg. *v.* Dickenson, 26 Law J., M. C. 204. Pedgrift *v.* Chevallier, 8 C. B., N. S., 240, 246. Ellis *v.* Kelly, 6 H. & N. 223. Craven *v.* Stubbins, 34 Law J., Ch. 126.

(*q*) Reg. *v.* Justices of Bucks, 8 Q. B. 807.

omission or mistake had existed; but no such objection is to be allowed unless the omission or mistake has been specified in the rule for issuing such certiorari(*r*). If, on the face of an order, the justices making it are not described as justices "in and for" the borough in which the order is made, or there is any other defect in point of form, the court will amend the defect without payment of costs on either side(*s*).

1011 *Of testing the legality of a commitment by writ of habeas corpus.*—The legality of an imprisonment under a warrant of commitment may be brought under the consideration of the superior courts, or a judge in chambers, by writ of *habeas corpus*, which may be sued out either in term or vacation. It is directed to the gaoler in whose custody the prisoner is detained, directing him to bring up the body of such prisoner before the court or judge, together with the cause of his being taken and detained(*t*). Where a prisoner has been lodged in gaol under a bad warrant of commitment in execution of a conviction, a good warrant of commitment subsequently made out and delivered to the gaoler, but before a rule for a *habeas corpus* has been obtained, is a good answer to the rule(*u*).

The validity of the commitment may be tried on moving for a rule to show cause why a writ of *habeas corpus* should not issue, and why, in the event of the rule being made absolute, the prisoner should not be discharged, without the writ actually issuing, or the prisoner being personally brought before the court(*x*). On moving for a writ of *habeas corpus*, the conviction may be brought before the court, verified by affidavit, for the purpose of defeating the magistrate's commitment; but in such case the commissioner, before whom the affidavit is sworn, ought to certify on the exhibit annexed that it is the document referred to in the affidavit(*y*). Although a return to a writ of *habeas corpus* may be good on the face of it, it may be shown that the conviction and commitment, under which the prisoner is detained, were substantially a civil proceeding, and that the arrest took place on a Sunday(*z*).

Upon a return to a *habeas corpus* affidavits are not admissible to

(*r*) Reg. v. Higham, 26 Law J., M. C. 116. R. v. Purdey, 34 Law J., M. C. 4.
(*s*) Reg. v. Hellingly, 1 Ell. & Ell. 749; 28 Law J., M. C. 167.
(*t*) 2 Chitt. Arch. Pr. 1309, 11 ed. Fry's HABEAS CORPUS (Canadian Prisoner's case).
(*u*) Cross, *Ex parte*, 26 Law J., M. C. 201. Reg. v. Richards, 5 Q. B. 932. Smith, *Ex parte*, 27 Law J., M. C. 186.
(*x*) Eggington's case, 2 Ell. & Bl. 781.
(*y*) Allison, *In re*, 10 Exch. 561.
(*z*) Eggington's case, 2 Ell. & Bl. 717. Swan v. Dakins, 16 C. B. 98.

show that the offence was not committed within the jurisdiction of the committing justice(*a*).

When a prisoner is entitled to his discharge from custody as a matter of right, the court has no power to impose any terms upon him as the condition of his release, and will not make his discharge from custody dependent upon his undertaking to bring no action against those who have unlawfully caused him to be imprisoned(*b*).

1012 *Proceedings against justices to compel them to act in particular cases.*— By the 11 & 12 Vict. c. 44, s. 2, it is enacted, that in all cases where a justice of the peace shall refuse to do any act relating to the duties of his office as such justice(*c*), it shall be lawful for the party requiring such act to be done to apply to the Court of Queen's Bench, upon an affidavit of the facts, for a rule calling upon such justice, and also the party to be affected by such act, to show cause why such act should not be done; and if, after due service of such rule, good cause shall not be shown against it, the said court may make the same absolute, with or without, or upon payment of, costs, as to them shall seem meet; and the justice, upon being served with such rule absolute, is to obey the same and do the act required; and no action or proceeding whatsoever is to be commenced or prosecuted against such justice for having obeyed the rule and done the act thereby required(*d*).

Before the court will make an order under this section of the statute it must be satisfied that the act sought to be enforced would be a lawful act. Where a rule was obtained calling upon justices to show cause why they should not issue a distress-warrant to enforce an order made by them, and it appeared that the order was invalid, and that the issuing and execution of a distress-warrant upon it would be an act of trespass, the court discharged the rule(*e*). But the court cannot inquire into the merits, and if the justices have jurisdiction, and the order is good upon the face of it, they will be compelled to enforce it(*f*).

The court will not try a doubtful question of title on application for an order under this section. "It would be very awkward," observes Patteson, J., "if the new statute had the effect of bringing all questions of title before us upon affidavit"(*g*).

(*a*) Smith, *Ex parte*, 27 Law J., M. C. 186.
(*b*) Downey's case, 7 Q. B. 281.
(*c*) As to what is a refusal, see R. *v.* Paynter, 26 Law J., M. C. 102.
(*d*) Reg. *v.* Mainwaring, Ell. Bl. & El. 474.
(*e*) Reg. *v.* Collins, 21 Law J., M. C. 73.
(*f*) Hartley, *In re*, 31 Law J., M. C. 232.
(*g*) Reg. *v.* Browne, 13 Q. B. 654.

1013 *Right of county justices to order the expense of county litigation to be defrayed out of the county funds.*—Wherever a duty is imposed on a county, and costs incidentally and necessarily arise in questioning the propriety of acts done to enforce that duty, the magistrates who have the superintendence of the county purse have a right to defray such expenses out of the county stock. Expenses of this sort have always been borne by the county, and uniform and unbroken usage *facit jus*(*h*).

1014 *Of the power of justices to give costs.*—Justices in their courts have power under divers statutes to order payment of costs by the party whom they decide against(*i*). An order directing the losing party to pay costs to the clerk of the peace to be by him paid to the party entitled to them is correct in form(*k*). Where there has been an information before, and a conviction by, justices, which conviction is appealed against and quashed, the informer lodging the information, and not the justices who convict, is the party to the proceedings against whom the order for costs is to be made(*l*).

SECTION II.

EXEMPTION OF CONSTABLES AND THEIR ASSISTANTS FROM LIABILITY WHEN ACTING IN THE EXECUTION OF WARRANTS AND ORDERS OF MAGISTRATES.

1015 *Exemption of constables, officers, and their assistants from liability for acts done by them in obedience to a warrant of justices.*—By 24 Geo. 2, c. 44, s. 6, it is enacted, that no action shall be brought against any constable or other officer, or against any person acting by his order or in his aid, for anything done in obedience to any warrant under the hand and seal of any justice, until demand has been made or left at his usual place of abode by the party intending to bring the action, or his attorney or agent, in writing, signed by the party demanding the

(*h*) Rex. v. Essex, 4 T. R. 591.

(*i*) As to costs under the vagrant Acts, 5 Geo. 4, c. 83. Costs in appeals, 12 & 13 Vict. c. 45, ss. 5, 13. Reg. v. Justices of Middlesex, L. R., 6 Q. B. 220. Rawnsley v. Hutchinson, L. R., 6 Q. B. 305. Costs of prosecutions for the non-repair of a highway, 5 & 6 Wm. 4, c. 50, s. 98. Where the liability to repair is disputed, 25 & 26 Vict. c. 61, s. 19.

(*k*) Gay v. Matthews, 33 Law J., M. C. 14. As to orders to pay to the party entitled, see Reg. v. Huntley, 3 Ell. & Bl. 172.

(*l*) Reg. v. Purdey, 34 Law J., M. C. 4.

same(*m*), of the perusal and copy of such warrant, and the same hath been refused or neglected for the space of six days after demand. And in case after demand and compliance therewith any action shall be brought against such constable, officer, or person acting in his aid, without making the justice a defendant, the jury shall, on production and proof of the warrant at the trial, give their verdict for the defendant, notwithstanding any defect of jurisdiction in such justice. And if the action is brought jointly against the justice and constable, or officer, etc., then, on proof of the warrant, the jury shall find for such constable, officer, etc., notwithstanding such defect of jurisdiction.

Every person to whom a statute requires a warrant to be directed and who is required to execute the same, may be considered an officer of the law, coming within the principle of the protection afforded by this statute(*n*), and has the period of six days after the demand of his authority for the production of it; within which time, if he comply with the demand, he secures his indemnity. But if he delay after that time, he subjects himself to be sued as any other person. If, however, after the six days have expired, but before the issue of a writ, he complies with the demand, he is still entitled to the protection of the statute(*o*). This statute is confined to actions of tort(*p*), and the officer, in order to be entitled to the protection, must show that in doing what he did he acted in obedience to the warrant; for if he exceeds his authority, or acts without a warrant, or arrests a person not named in the warrant, he is not entitled to the benefit of the statute(*q*).

If the warrant is directed to be executed within the limits of a particular county, and the officer by mistake executes it beyond the prescribed limits, he has not acted in obedience to the warrant, and is not entitled to the statutory protection(*r*). Neither can he claim the benefit of the statute in cases where, when acting under a search-warrant, he has seized and carried away articles not mentioned in the warrant, and not in anywise connected therewith(*s*); nor when, under a warrant to apprehend *A*, or to seize the goods of *A*, he appre-

(*m*) Clark *v.* Woods, 2 Exch. 405.
(*n*) Pedley *v.* Davis, 30 Law J., C. P. 374.
(*o*) Jones *v.* Vaughan, 5 East, 447.
(*p*) Irving *v.* Wilson, 4 T. R. 485.
(*q*) Bell *v.* Oakley, 2 M. & S. 259. Postlethwaite *v.* Gibson, 3 Esp. 226. Galliard *v.* Laxton, *ante*, p. 698.
(*r*) Milton *v.* Green, 5 East, 233.
(*s*) Crozier *v.* Cundey, 6 B. & C. 232.

hends *B*, or takes the goods of *B*(*t*); nor if he exceeds the authority given him by the warrant and commits any excess, such as remaining longer in a dwelling-house than he was legally authorized to remain, or breaking open doors and windows which he was not authorized to break open(*u*). But whenever the officer has acted in obedience to the warrant, he secures his indemnity by complying with the requirements of the statute, although the warrant may be illegal or improper, or may have been granted by a magistrate who had no jurisdiction or power to grant it(*x*). If the officer loses the protection of the statute, he must justify under the justice's warrant(*y*).

By the 11 & 12 Vict. c. 43, s. 19, constables are authorized to execute warrants out of their districts, provided they are executed within the jurisdiction of the justice granting or backing the same. But the constable is not bound to execute a warrant out of his own district(*z*). A warrant of distress for rates directed to two persons for execution, may be executed by one of them alone(*a*).

1016 *Excess of authority on the part of constables and officers—Handcuffing unconvicted prisoners.*—If a constable abuses the legal authority conferred upon him by detaining a prisoner an unreasonable time without taking him before a magistrate, or by unnecessarily handcuffing him, he becomes a trespasser *ab initio*, and cannot protect himself under the warrant. A constable or peace-officer has no right to handcuff an unconvicted prisoner unless he has attempted to escape, or except it be necessary in order to prevent his escaping. "Such a degree of violence and restraint," observes Bayley, J., "upon the person cannot be justified, even by a constable, unless he makes it appear that there are good special reasons for his resorting to it"(*b*).

1017 *Abuse of a search-warrant.*—If a constable armed with a search-warrant searches the wrong house, or stays an unreasonable and unnecessary time in a house he is authorized to search, or uses any unnecessary violence in the execution of the warrant, or seizes things not specified in the warrant, and which are not likely to furnish evidence of

(*t*) Money *v.* Leach, 3 Burr. 1768. Kay *v.* Grover, 7 Bing. 312; 5 M. & P. 145. Hoye *v.* Bush, 1 M. & Gr. 775; 2 Sc. N. R. 92.

(*u*) Peppercorn *v.* Hofman, 9 M. & W. 628. Ball *v.* Oakley, 2 M. & S. 259. See Sir Michael Foster's Discourse of Homicide, p. 319.

(*x*) Atkins *v.* Kilby, 11 Ad. & E. 784. Price *v.* Messenger, 2 B. & P. 158. Reg. *v.* Davis, 30 Law J., M. C. 159.

(*y*) Read *v.* Coker, 13 C. B. 859.

(*z*) Gimbert *v.* Coyney, M'Clel. & Y. 469.

(*a*) Lee *v.* Vessey, 25 Law J., Exch. 271.

(*b*) Wright *v.* Court, 6 D. & R. 625; 4 B. & C. 596. Griffin *v.* Coleman, 4 H. & N. 265; 28 Law J., Exch. 134.

the identity of the articles stolen and mentioned in the warrant, or to support a charge of felony, he becomes a trespasser, and is liable to an action for damages(*c*).

SECTION III.

REMEDIES FOR WRONGS DONE UNDER COLOR OF CONVICTIONS AND WARRANTS OF JUSTICES.

1018 *Replevin of chattels distrained under warrant of justices.*—"Though in ordinary practice," observes Parke, B., "the remedy by replevin is applied only to a distress for rent, yet it is at common law applicable in all cases where goods are improperly taken(*d*); and I find no satisfactory authority to show that it will not lie where goods are improperly taken under a warrant of a justice of the peace. In some cases, no doubt, the court will interfere to prevent a replevin, to save its process from being defeated. The rule is correctly stated in Chief Baron Gilbert's treatise on Replevin, p. 138, where it is said, 'If a superior court award an execution, it seems that no replevin lies for goods taken by the sheriff by virtue of the execution, and if any person shall pretend to take out a replevin and execute it, the court would commit them for contempt for attempting to defeat the execution, and would punish the sheriff by attachment.' But Chief Baron Gilbert also says, 'that in cases in which the court has no jurisdiction, the goods may be replevied.' If, therefore, goods have been seized under a justice's warrant, and the justice had no jurisdiction to make the warrant, the goods so seized may be replevid"(*e*). "It is true," further observes Alderson, B., "that replevin will not lie for goods seized under the judgment of a superior court; for if you replevied on the first judgment, you could do so on the judgment upon that also, and so there would be replevin on replevin *ad infinitum*. It is different in the case of an inferior jurisdiction, which is to be set right by the superior"(*f*).

(*c*) Crozier *v.* Cundey, 6 B. & C. 232; 9 D. & R. 224. Burns, Justice, SEARCH-WARRANT.
(*d*) Mellor *v.* Leather, 1 Ell. & Bl. 619.
(*e*) George *v.* Chambers, 11 M. & W. 159. Gay *v.* Mathews, 32 Law J., M. C. 58. Pease *v.* Chaytor, ib. 121. Morrell *v.* Martin, 3 M. & Gr. 590. Parke, B., Jones *v.* Johnson, 5 Exch. 875.
(*f*) 11 M. & W. 161. As to proceedings in replevin, see *ante*, pp. 671-672.

1019 *Of actions against justices.*—By the 11 & 12 Vict. c. 44, s. 1, it is enacted, that every action thereafter against a justice of the peace, for any act done by him in the execution of his duty with respect to any matter within his jurisdiction, shall be an action on the case as for a tort, and in the declaration of the cause of action it shall be expressly alleged and proved at the trial that the act was done maliciously, and without reasonable and probable cause(*g*).

Also (s. 2), that for any act done by a justice of the peace in a matter of which by law he has not jurisdiction, or in which he shall have exceeded his jurisdiction, any person injured thereby, or by any act done under any conviction, or order made, or warrant issued, by such justice in any such matter, may maintain an action against such justice as before the passing of the Act, without proving that the act was done maliciously, and without reasonable and probable cause(*h*): but no such action shall be brought for anything done under such conviction or order, until after the conviction shall have been quashed, either upon appeal or upon application to the Court of Queen's Bench: nor shall any such action be brought for anything done under any warrant which shall have been issued by such justice to procure the appearance of a party before him, and which shall have been followed by a conviction or order in the same matter, until after the conviction or order shall have been quashed; or if such last-mentioned warrant shall not have been followed by any such conviction or order, or if it be a warrant upon an information for an alleged indictable offence, nevertheless, if a summons was issued previously to such warrant, and served upon the party, either personally or by leaving the same for him with some person at his last or most usual place of abode, and he did not appear according to the exigency of the summons(*i*), in such case no action shall be maintained against such justice for anything done under such warrant.

1020 *When the action is brought in respect of things done without jurisdiction, or in excess of jurisdiction*, therefore, as where a warrant is made or an order granted, which the justice had no authority to make or grant, and the warrant or order has been enforced, and any person has been imprisoned or his goods have been seized under it, an action for a trespass is maintainable against the justice(*k*). But before such action is

(*g*) Burley *v.* Bethune, 5 Taunt. 563.

(*h*) See Middleton *v.* Gale, 8 A. & E. 155. Pease *v.* Chaytor, *supra*.

(*i*) An appearance by counsel or attorney is a sufficient appearance. Bessell *v.* Wilson, 1 El. & Bl. 496.

(*k*) Leary *v.* Patrick, 15 Q. B. 272. Lawrenson *v.* Hill, *ante*, p. 852.

commenced notice of action must be given (*post*, p. 872), and the conviction or order must be quashed.

1021 *When the action is brought for a malicious conviction, commitment, or distress, or a malicious abuse by a magistrate of the functions of his office*, it is not necessary to get the conviction quashed before bringing the action, but notice of action must be given, and the action must be brought within the time limited by the statute, and proof must be given that the magistrate acted corruptly or maliciously, and had no reasonable or probable cause for convicting or making the order(*l*).

Where an information was laid before a justice, upon which he convicted and awarded a penalty and costs, and ordered them to be levied by distress, and so far pursued his jurisdiction, but he then exceeded it, by adding an alternative that the plaintiff should be put in the stocks in case the penalty and costs were not paid or raised by distress, and the plaintiff's goods were seized under a distress, but the plaintiff was not put in the stocks, and the conviction was afterwards quashed, and an action was brought against the justice for the distress, it was held that the justice was entitled to the protection afforded by the first section of the statute, and could not be treated as a trespasser. "It cannot be doubted," it was observed, "that the justice had jurisdiction in everything except the alternative order, and the action is brought, not for putting the plaintiff in the stocks under it, but for doing that which the defendant might have justified if he had drawn up his conviction in proper form. The construction of sect. 2 of the statute must be so controlled by sect. 1 as to be consistent with it; and that is done by so construing sect. 2 as to confine its application to cases in which the cause of action arises from the excess of jurisdiction, as it would have done in this case, if the plaintiff had been put in the stocks, and had brought his action for that"(*m*).

1022 *Effect of the existence of a power of appeal on the right to bring an action.*—It does not follow that because a plaintiff had a power of appeal and failed to exercise it, that he is thereby precluded from having recourse to the ordinary remedy by action to try the right. There is a great distinction in this respect between cases where there was jurisdiction to convict or to make an order and issue a warrant, and the aggrieved party had a ground of appeal against the conviction or order made with jurisdiction, and the case where there was no jurisdiction to convict or to make the order, and so no jurisdiction

(*l*) Kirby v. Simpson, 10 Exch. 367; 23 Law J., M. C. 165. See *post*, p. 876.

(*m*) Per Coleridge and Earle, JJ.; Barton v. Bricknell, 13 Q. B. 393; 20 Law J., M. C. 1. Lawrenson v. Hill, *ante*, p. 835.

to issue the warrant. "If, in the first instance, the court has gone beyond its jurisdiction, the Act is void. The party aggrieved may, if he pleases, appeal, because excess of jurisdiction is as much a ground of appeal as a merely erroneous decision; and if the court of appeal erroneously confirms the act of the court below, it may be that the party appealing cannot object to the want of jurisdiction in any collateral proceeding. His own act may estop him personally, but he is not bound to appeal, because he is at liberty to treat the act as void"(*n*).

1023 *Objections by justices to actions against them in the county court.*—In all actions against justices of the peace in the county court, the action must be brought in the court within the district in which the act complained of was committed; but no action can be brought in any county court against a justice of the peace for anything done by him in the execution of his office, if such justice shall object thereto(*o*). Where a justice of the peace, who had been sued in the county court for an act done by him in the execution of his office, gave notice that he objected to being sued in the county court, and afterwards applied for and obtained a writ of certiorari to remove the cause from the county court into the Court of Exchequer, it was held that this notice terminated the proceedings in the county court altogether, and therefore that the suit could not be removed into the superior court(*p*).

1024 *Of setting aside certain actions brought against justices of the peace.*—Provision is made by the 11 & 12 Vict. c. 44, s. 7, for setting aside proceedings in certain actions against justices of the peace, brought in defiance of the provisions of that statute. (See *ante*, pp. 869–70.)

1025 *Limitation of actions against justices of the peace.*—By s. 8 it is enacted, that no action shall be brought against any justice of the peace for anything done by him in the execution of his office, unless the same be commenced within six calendar months after the act complained of has been committed. The period of limitation runs from the termination, not from the commencement, of the wrongful act(*q*). Therefore, when a person has been wrongfully imprisoned under an illegal commitment, the time of limitation will run from the period of the termination of the imprisonment, and not from the time of the making

(n) Churchwardens of Birmingham *v.* Shaw, 10 Q. B. 880; 18 Law J., M. C. 89. Pedley *v.* Davis, 10 C. B., N. S. 492; 30 Law J., C. P. 379.
(o) 11 & 12 Vict. c. 44, s. 11.
(p) Weston *v.* Sneyd, 1 H. & N. 708; 26 Law J., Exch. 161.
(q) Jacomb *v.* Dodgson, 32 Law J., M. C. 113.

out of the warrant of commitment(*r*). And where goods have been sold under an illegal warrant of distress, the time of limitation will run from the period of the sale of the goods, and not from the time of the original seizure. The seizure is not made absolutely in the first instance, but with a view only to the detention of the goods until the amount ordered to be levied should be paid, and their subsequent sale if it should not be paid, so that the seizure and sale form part of one continued grievance, which distinguishes it from cases where the seizure is for a forfeiture(*s*).

Where an action is intended to be brought against a justice of the peace for a wrongful imprisonment, under a conviction or order of commitment which the justice had no jurisdiction to make, the time of limitation will run from the time of the making of the conviction or order, and not from the time of the quashing thereof. The quashing of the conviction is only a condition to the prosecution of the action, like the delivery of an attorney's bill, or the giving a notice of action(*t*).

1026 *Of notice of action against justices.*—By s. 9 it is enacted, that no action shall be commenced against any justice of the peace for anything done by him in the execution of his office, until one calendar month at least after a notice in writing of such intended action shall have been delivered to him, or left at his usual place of abode, by the party intending to commence such action, or by his attorney or agent; in which notice the cause of action, and the court in which the same is intended to be brought, shall be clearly and explicitly stated, and upon the back thereof shall be indorsed the name and place of abode of the party intending to sue, and also of the attorney or agent, when the notice is served by an attorney or agent(*u*).

Statutory clauses for the protection of magistrates in the execution of the duties of their office, appear always to have been construed on the principle that where the magistrate, with some color of reason and *bonâ fide*, believes that he is acting in pursuance of his lawful authority, he is entitled to protection, although he may proceed illegally or exceed his jurisdiction(*x*). And where he acts in his magisterial capacity maliciously, and without *bonâ fides*, he is still entitled to the statutory protective preliminaries to an action, and to an opportunity

(*r*) Massey *v.* Johnson, 12 East, 67. Hardy *v.* Ryle, 9 B. & C. 607. Violett *v.* Sympson, 8 Ell. & Bl. 346.

(*s*) Collins *v.* Ross, 5 M. & W. 202.

(*t*) Haylock *v.* Sparke, 1 Ell. & Bl. 471; 22 Law J., M. C. 67, 71.

(*u*) As to notice of action, see *ante*, pp. 712-717, 805, 806.

(*x*) Hazeldine *v.* Grove, 3 Q. B. 1006. Lawrenson *v.* Hill, 10 Ir. Com. Law Rep. 504; *ante*, pp. 709-710.

of tendering amends. A magistrate may act maliciously (*post*, s. 2), and yet may have reasonable and probable cause for his acts. So he may be in the execution of his duty although he may act maliciously; and in all cases where the substance of the complaint is that he has abused his power as a magistrate, he is entitled to notice of action(*y*). The question as to whether the magistrate was acting in the execution of his office, is a question at the trial for the judge, and not for determination by a jury(*y*).

Wherever the magistrate has authority to act upon the subject-matter of the complaint brought before him, he must be considered to have acted by virtue of his office, although the place where the offence was committed was not within his jurisdiction(*z*). In a case where one magistrate acted alone in a matter which required the concurrence of two, it was held that he was acting in the execution of his office, and was entitled to notice of action(*a*).

Wherever, also, the magistrate, in what he did, intended to act in the execution of some special power or authority conferred by a statute requiring notice of action to be given, notice of action must be given to the magistrate, although, in point of fact, he was not acting under the statute, and had no power to do what he has done (*ante*, pp. 709–711). But to be entitled to the protection, the party claiming it must be actually a justice, accidentally committing an error, and not doing a wrongful act for his own benefit(*b*).

A person who intends to sue a justice of the peace for an act done by him in a matter respecting which he had no jurisdiction, need not wait for the quashing of the conviction or order of commitment before giving the notice of action. The notice of action may be given as soon as the wrongful act has been committed, though the action itself cannot be commenced until after the conviction or commitment has been quashed(*c*). If in the case of a conviction the magistrate receives notice of action before the conviction is quashed, he may at his peril rely upon the validity of the conviction, and abstain from tendering amends; but if he does so and the conviction is quashed, the action may be commenced against him one calendar month after service of the notice(*d*).

(*y*) Kirby *v.* Simpson, 10 Exch. 358; 23 Law J., M. C. 165.
(*z*) Prestidge *v.* Woodman, 1 B. & C. 12; 2 D. & R. 45.
(*a*) Weller *v.* Toke, 9 East, 363.
(*b*) Morgan *v.* Palmer, 2 B. & C. 729; 4 D. & R. 433. Briggs *v.* Evelyn, 2 H. Bl. 114.
(*c*) Haylock *v.* Sparke, 22 Law J., M. C. 67.
(*d*) Haylock *v.* Sparke, *ut sup.*

1027 *Statement of the cause of action on the face of the notice.*—The nature of the cause of action, or of the complaint or grievance, should be explicitly stated on the face of the notice, so as to show whether the plaintiff proceeds against the magistrate for an act done by him maliciously, and without reasonable and probable cause, in the execution of his duty as a justice, with respect to some matter within his jurisdiction, within the first section of 11 & 12 Vict. c. 44, or for an act done by him in a matter over which he had no jurisdiction, or respecting which he had exceeded his jurisdiction within the second section of that statute. If the notice fails clearly and explicitly to point out the nature of the cause of action, so as to show whether it is governed by the first or the second section of the statute, it will be a bad notice(*e*). "But the notice," justly observes Abbott, C.J., "ought not to be construed with great strictness, its object being merely to inform the defendant substantially of the ground of complaint, but not of the mode or manner in which the injury has been sustained"(*f*). The time and place of the doing the act complained of ought also to be stated in the notice. "I do not go so far," observes Lord Denman, "as to say that a party will always be strictly bound to prove the time and place which he names in his notice, but I think the words of the statute require that a time and place for the occurrence be named"(*g*).

1028 *Tender of amends before action.*—By 11 & 12 Vict. c. 44, s. 11, it is enacted, that after notice of action has been given to a justice, and before the action shall be commenced, the justice to whom such notice shall be given may tender to the party complaining, or to his attorney or agent, such sum of money as he may think fit, as amends for the injury complained of in such notice; and if the jury at the trial shall be of opinion that the plaintiff is not entitled to damages beyond the sum so tendered, then they shall give a verdict for the defendant, and the plaintiff shall not be at liberty to elect to be non-suited. Whether the preliminary matters required by statute for the protection of magistrates have been duly complied with appears to be a question for the decision of the judge at the trial, and not for determination by a jury(*h*).

1029 *Of the computation of the month's notice, and of the time for tendering amends.*—The general rule is, that when time for a particular period

(*e*) Taylor *v.* Nesfield, 3 Ell. & Bl. 724; 23 Law J., M. C. 169.
(*f*) Prickett *v.* Gratrex, 8 Q. B. 1020. Jones *v.* Bird, 5 B. & Ald. 844. Jacklin *v.* Fytche, 14 M. & W. 387.
(*g*) Martins *v.* Upcher, 3 Q. B. 668.
(*h*) Parke, B., Kirby *v.* Simpson, 10 Exch. 366. Arnold *v.* Hamel, ib. 366.

is allowed to a person to do any act, the day from which the computation is to be made is to be reckoned exclusively. And whenever a certain space of time is given to a person to do some act, which space of time is included between two other acts to be done by another person, "both the days of doing those acts ought," observes Alderson, B., "to be excluded, in order to insure to him the whole of that space of time. Thus, where a month's notice of action is required to be given to a justice of the peace before an action can be commenced against him, and the justice is to have the whole of that month for tendering amends, both the day of the giving of the notice and the day of the tendering amends are to be excluded from the computation of the time; for, whenever the Act of Parliament allows a party an intervening period of a month, within which to deliberate whether he will tender amends or not, unless you exclude both the first and the last day, you do not give him a whole month for that purpose"(*i*).

1030 *Of the statutory protection to constables, officers, and their assistants from vexatious actions.*—Where a constable is acting *bona fide*, and with an honest opinion that he is discharging his duty, and that he is acting at the time in obedience to the warrant of a magistrate, he is entitled to the statutory protection mentioned *ante*, p. 709 *et seq.*, although he is altogether mistaken in the proceedings he has adopted, and had in truth no warrant or authority for what he has done. If, for example, an officer, meaning *bona fide* to act under a warrant, by mistake arrests the wrong person, or seizes the goods of the wrong party, and so does an act which the warrant did not order him to do, and for which he had consequently no authority, he is, nevertheless, if he acted *bona fide*, entitled to the benefit of the protecting clause, limiting the time for the bringing of an action against him for the trespass(*k*).

1031 *Parties to be made defendants—Wrongful convictions and orders by one justice acted upon by another justice.*—By 11 & 12 Vict. c. 44, s. 3, it is enacted, that where a conviction or order shall be made by one justice, and a warrant of distress or of commitment shall be granted thereon by some other justice, *bona fide* and without collusion, no action shall be brought against the latter by reason of any defect in such conviction or order, or for any want of jurisdiction in the justice who made the same; but the action, if maintainable, is to be brought against the justice or justices who made the conviction or order.

1032 *Liability of persons who set justices and constables in motion.*—If a person

(*i*) Alderson, B., Young *v.* Higgon, 6 M. & W. 54. See *ante*, p. 715.
(*k*) Parton *v.* Williams, 3 B. & Ald. 335. Smith *v.* Wiltshire, 5 Moore, 322.

merely lays a cause of complaint before a magistrate in a matter over which the magistrate has a general jurisdiction, and the magistrate grants a warrant, upon which the person charged is arrested, the party laying the complaint is not responsible for an assault and false imprisonment, although the particular case be one in which the magistrate had no authority to act(*l*). But if the proceeding is founded in malice, or if the complainant accompanies the constable charged with the execution of the warrant, and points out the person to be arrested under it, he may render himself liable either to an action for a malicious prosecution, or to an action for false imprisonment(*m*). If a private person intervenes between the magistrate and the constable, and busies himself in executing the justice's warrant, and the proceedings should be set aside, he may render himself responsible in damages for the consequences of his interference(*n*). Where the defendant having accused the plaintiff of embezzlement, both parties agreed to go before a magistrate to settle the matter, and the defendant, addressing the magistrate, said he came to prefer a charge of embezzlement against the plaintiff, whereupon the plaintiff was ordered to go into the dock, and was detained in custody until the charge had been heard and dismissed, it was held that the defendant was not responsible for the imprisonment, which was an act done by the magistrate in the exercise of his authority(*o*).

1033 *Evidence at the trial of actions against justices*(*p*).—In all actions against justices of the peace for any matter done by them in the execution of their office, they may plead the general issue, not guilty by statute, and give the special matter in evidence(*q*); and the same privilege is extended by various statutes to constables and officers in cases of actions against them for things done by them by virtue of their offices. If the act of a magistrate is done without jurisdiction, it is a trespass; if within his jurisdiction, the action rests upon the corruptness of motive, and to establish this the act must be shown to be malicious.(*r*).

1034 *Proof of malice and of the want of reasonable and probable cause.*—There is a wide distinction between an action against a prosecutor for

(*l*) Carratt *v.* Morley, 1 Q. B. 28.

(*m*) Cohen *v.* Morgan, 6 D. & R. 8. Barber *v.* Rollinson, 1 Cr. & M. 330. West *v.* Smallwood, 3 M. & W. 418; *ante*, pp. 717-720, 809.

(*n*) Painter *v.* Liv. Gas Co., 3 Ad. & E. 444.

(*o*) Brown *v.* Chapman, 6 C. B. 376. Barber *v.* Rollinson, 1 Cr. & M. 330.

(*p*) As to the pleadings, see *ante*, p. 809, *et seq.*

(*q*) 11 & 12 Vict. c. 44, s. 10. See *ante*, pp. 724, 725.

(*r*) Erle, J., Taylor *v.* Nesfield, 3 Ell. & Bl. 730.

a malicious prosecution, and an action against a magistrate for a malicious conviction and imprisonment thereunder. In the former case, proof that there was in reality no ground for imputing the crime to the plaintiff, shows that the prosecution was instituted without probable cause, and malice may be inferred from thence; but in an action against a magistrate for a malicious conviction, the question is not whether there was any actual ground for imputing the crime to the plaintiff, but whether, upon the hearing, there appeared to be none. The plaintiff must prove a want of probable cause for the conviction, which he can only do by proving what passed upon the hearing before the magistrate when the conviction took place. The magistrate has nothing to do with the guilt or innocence of the offender, except as they appear from the evidence laid before him. The conviction must be founded on that evidence alone, and it is impossible to show that there was no probable cause for the conviction without showing what that evidence was. There may be a malicious prosecution without a malicious conviction, and there may be an unfounded conviction by the magistrate without malice(*s*).

The question as to whether the magistrate has acted in the discharge of his duty with *bonâ fides*, and with reasonable and probable cause, is a question at the trial for the decision of the judge, and not for determination by a jury(*t*).

A justice's warrant put in by the plaintiff is evidence for the defendant of an information on oath before the justice recited in the warrant. The recital must be considered part of the warrant, and admissible evidence for the defendant, when the warrant is produced against him by the plaintiff, for the purpose of showing on what grounds, and in relation to what subject-matter he was acting when he granted it; in the same manner as if a magistrate were to commit for a felony on his own view, the warrant reciting that he had seen the felony committed when put in evidence against him, would be admissible evidence for him that he had seen the felony committed(*u*).

1035 *Evidence at the trial of actions against constables and officers—Proof of the injury having been done in execution of a warrant of justices.*—By the common law, an officer who merely executed the warrant of a magistrate, was answerable for the consequences if the magistrate acted without authority. But the 6th section of 24 Geo. 2, c. 44, makes it

(*s*) Burley *v.* Bethune, 5 Taunt. 583.
(*t*) Kirby *v.* Simpson, *ante*, p. 870.
(*u*) Haylock *v.* Sparke, 22 Law J., M. C. 71.

necessary to demand a copy of the warrant from the officer before he can be sued. If he gives that copy, although the party may be entitled to an action against the magistrate, yet, if he joins the officer in it, the production of the warrnt will be a protection to the latter, and will entitle him to a verdict. The 6th section is, therefore, obviously intended to protect the officer in those cases only where the justice remains liable. It is necessary, in order to bring the officer within it, that he should act most strictly in obedience to his warrant: and in that case the statute gives him absolute protection, at whatever time the suit may be brought against him(*x*). See *ante*, p. 865.

1036 *Proof of warrant of justices—Secondary evidence of the contents of a warrant.*—Where the high constable of a borough, who had been served with a subpœna duces tecum, to produce a warrant under which he had made a levy, stated that he had no doubt he had deposited the warrant in his office; that he had searched for it and could not find it, and did not know what had become of it, and that the town-clerk had access to his office, and might have taken it away, it was held that secondary evidence might be given of the contents of the warrant(*y*).

1037 *Proof by the plaintiff of his demand of the perusal and copy of the warrant.*—If a plaintiff's attorney, previous to bringing an action against a constable or officer for an imprisonment or seizure of goods by a constable, makes out two papers in writing precisely similar, purporting to be demands of the perusal and copy of the warrant, and signs both for his client, and then delivers one to the defendant, they are both duplicate originals; and the one retained by the attorney may be given in evidence at the trial, without proving any notice to produce the one left in the hands of the defendant. "Unless I am mistaken," observes Lord Eldon, C.J., "it is the usual course in actions of this sort to produce a duplicate original; and the same thing is done with respect to notices to quit. The practice of allowing duplicates of this kind to be given in evidence seems to be sanctioned by this principle, that the original delivered being in the hands of the defendant, it is in his power to contradict the duplicate original by producing the other if they vary"(*z*).

1038 *Proof by the defendant of the production of the warrant—Production and perusal of a copy of the warrant.*—Where the warrant under which the constable acted was lodged in the hands of the gaoler at the time the plaintiff was taken to prison, and the constable proved

(*x*) Abbott, C.J., Parton *v.* Williams, 3 B. & Ald. 332.
(*y*) Fernley *v.* Worthington, 1 M. & Gr. 491.
(*z*) Jory *v.* Orchard, 2 B. & P. 41.

that when the demand for the perusal of the warrant was made he produced a correct copy of it, telling the person making the demand that the original was in the hands of the gaoler, and no objection was made to the non-production of the original, it was held that there had been a substantial compliance with the requirements of the statute by the officer, so as to entitle him to the benefit of the statutory protection. "The conduct of the agent of the plaintiff," observes Lord Denman, C.J., "was such as to lead to the belief that the delivery of a copy of the warrant, under the circumstances, was all that was required. But for this, steps might have been taken to procure the original; and the plaintiff cannot therefore rely on its non-production to oust the constable of the protection of the statute"(*a*).

1039 *Damages recoverable in actions against justices of the peace.*—By 11 & 12 Vict. c. 44, s. 13, it is enacted, that where the plaintiff in any action against a justice of the peace, for anything done by him in the execution of his office, shall be entitled to recover, and shall prove the levying or payment of any penalty or money, under any conviction or order, as parcel of the damages he seeks to recover; or if he prove that he was imprisoned under such conviction or order, and seeks to recover damages for such imprisonment, he shall not be entitled to recover the amount of such penalty or sum so levied or paid, or any sum beyond the sum of 2*d.* as damages for such imprisonment, or any costs of suit whatever, if it is proved that he was actually guilty of the offence of which he was convicted, or that he was liable by law to pay the sum he was ordered to pay, and (with respect to such imprisonment) that he had undergone no greater punishment than that assigned by law for the offence of which he was convicted, or for non-payment of the sum he was ordered to pay.

If a magistrate has committed the plaintiff to prison in a case in which he has no jurisdiction, and the conviction is quashed (*ante*, p. 869), the magistrate is liable for all the usual and ordinary injurious consequences of a conviction and commitment, such as handcuffing, cutting off the hair, immersion in a bath, payment of penalties, fees, and all such expenses as are reasonably necessary to enable the plaintiff to procure his liberty; but the magistrate is not responsible for any unnecessary or excessive violence on the part of the officers executing the warrant(*b*).

(*a*) Atkins *v.* Kilby, 11 Ad. & E. 785.

(*b*) Mason *v.* Barker, 1 C. & K. 100. And see *ante*, pp. 851-854, as to damages recoverable in actions for false imprisonment.

CHAPTER XVI.

OF INJURIES FROM THE EXERCISE OF STATUTORY POWERS—STATUTORY COMPENSATIONS FOR INJURIES AUTHORIZED BY STATUTE.

SECTION I.—*Of injuries from the exercise of statutory powers*—Exemption of parties from personal liability in respect of things done under statutory authority—Negligent exercise of statutory powers—Nuisances from the negligent working of railways—Duties and responsibilities of public boards, trustees, and commissioners, surveyors, contractors, and workmen, acting in the exercise of statutory powers—Surveyors of highways—Effect of clauses in particular statutes exonerating persons from all personal liability in respect of things done in the bonâ fide execution of the statute—Responsibility of persons for negligence notwithstanding the protecting clause—Right of commissioners, trustees, and public officers to indemnify themselves in respect of costs and expenses out of the public funds they are authorized to administer—When expenses incurred through blunders or negligence may be charged upon a public or trust fund—Injuries from non-repair of authorized public works—Creation of nuisances in the bonâ fide exercise of statutory powers—Pollution of streams and injuries to docks, wharfs, towing-paths etc.—Power to take lands and streams for public purposes—Licenses to enter upon land to commence the construction of public works—Seizure of goods in the exercise of statutory powers.

SECTION II.—*Of statutory remedies for the recovery of compensation for injuries authorized by statute.*—Injuries establishing a right to statutory compensation—Ascertaining the amount by arbitration—Damages recoverable before justices—Statutory remedy for the recovery of compensation under the Lands Clauses and Railway Clauses Consolidation Act—Statutory compensation to tenants and occupiers of lands taken for public works—Notices by claimants of the nature and extent of the injury, and the amount of compensation required—Inquisition of damage—Assessment of damage to which the claimant is not legally entitled—Removal of the inquisition by certiorari—Actions for the recovery of compensation—Pleadings, defences, and evidence—Remedy for subsequent unforeseen damage.

SECTION III.—*Remedies by action and by injunction in respect of injuries from the negligent doing of things authorized to be done by statute.*—Limitation of actions in respect of things done under local and personal statutes—Accrual of the cause of action—Notice of action—Tender of amends—Parties to be made

defendants—Pleadings, defences, and evidence—Injunction to prevent unnecessary injury from the exercise of statutory powers—Injunction to restrain nuisances by public bodies and local boards, and to prevent misuse of their property.

SECTION I.

OF INJURIES FROM THE EXERCISE OF STATUTORY POWERS.

1040 *Exemption of persons from personal liability in respect of things done under statutory authority.*—An action will not lie on behalf of a plaintiff who has sustained injury from the execution of powers and authorities given by an Act of Parliament, those powers being exercised with judgment and caution(*a*). But if the statutory powers are exceeded, or are not strictly pursued(*b*), or the things authorized to be done are carelessly and negligently done, an action is maintainable for damages (*post*, s. 3). "If the thing done is within the statute, it is clear that no compensation can be afforded for any damage sustained thereby, except so far as the statute itself has provided it; and this is clear on the legal presumption, that the act creating the damage being within the statute, must be a lawful act"(*c*). Where, therefore, the legislature authorized a railway company to lay down a railway alongside a public highway, it was held that the legislature must be presumed to have contemplated the possibility that the railway would be a nuisance to persons using the highroad, and that such persons must submit to the inconvenience necessarily resulting from the working of the railway(*d*). And where a railway company was authorized to lay down a railway across a public thoroughfare, and have gates across the highroad to prevent persons from passing along the road at the time when it would be dangerous by reason of trains being near at hand, it was held that a person, who had been delayed and impeded in his journey along the highroad by reason of the necessary closing of the

(*a*) Ld. Truro, Lond and North.-West. Rail. Co. *v.* Bradley, 3 Mac. & G. 341; 6 Rail. Cas. 551. Caledonian Rail. Co. *v.* Ogilvy, 2 Macq. Sc. App. 246. Boulton *v.* Crowther, 2 B. & C. 706. Slatten *v.* Des Moines Valley R. R. Co., 29 Iowa, 154. Radcliff's Executors *v.* Mayor, etc., of Brooklyn, 4 N. Y. 195. Bellinger *v.* N. Y. Central R. R. 23 N. Y. 42.

(*b*) Brownlow *v.* Metrop. Board, etc., 31 Law J., C. P. 140. R. *v.* Darlington Local Board, etc., 5 B. & S. 515; 6 ib. 562; 33 Law J., Q. B. 305; 35 ib. 45.

(*c*) Duncan *v.* Findlator, 6 Cl. & Fin. 908.

(*d*) Rex. *v.* Pease, 4 B. & Ad. 42. But not to unnecessary annoyances. Manchester and Altr. Rail. Co. *v.* Fullerton, 14 C. B., N. S. 54. Vason *v.* South Carolina R. R. Co., 42 Ga. 631.

gates, had no right of action against the railway company for the injury he had sustained. Neither has the owner of an estate any right of action against a railway company for laying down a railway across a turnpike road close to the entrance of his estate under the powers of an Act of Parliament, by means whereof he is impeded and hindered in going from and returning to his house, and his horses are frightened and become ungovernable from the noise of the trains(*e*). But these cases only decide that where the statute expressly contemplates the creation of a nuisance no action will lie. Where, therefore, a canal company were empowered to take the water of a certain brook, which was then pure, but subsequently became polluted by drains, etc., and the company by using and penning back the water of the brook in the canal after it had become so polluted created a nuisance, it was held that they were responsible(*f*).

It has been held, that if a canal company has been authorized by statute to make and use a canal, and the canal is made in the usual manner, and water leaks out and comes upon the plaintiff's premises, without any negligence or breach of duty on the part of the canal company, the company will not be responsible in damages for the injury(*g*); but every canal company is bound to maintain and keep its canal in good order, and manage it so that it may not become a source of injury to the adjoining landowners; and if the water can be prevented from escaping from the canal, it is the duty of the company to adopt the necessary measures for the purpose(*h*).

1041 *Injuries from the negligent execution of statutory powers.*—"Powers given by statute," observes Watson, B., "are not to be used to the peril of the lives or limbs of the Queen's subjects. They are to be exercised reasonably and with due care, so as not by negligence to cause dangers to others." Where, therefore, a canal company was authorized by a statute to intersect highways with their canal, carrying the highway over the canal by means of bridges, it was held that they were bound to erect proper and suitable bridges, sufficient for all the requirements of an increasing traffic, and were bound to put up proper lights, fences and guards for the protection of the public; and that if they erected a swing-bridge, they must use all due and proper

(*e*) Caledonian Rail. Co. *v.* Ogilvy, 2 Macq. Sc. App. 229. See Kellinger *v.* Forty Second Street, etc., R. R. Co., 50 N. Y. 206.

(*f*) Reg. *v.* Bradford Navigation Co., 34 Law J., Q. B. 191.

(*g*) Whitehouse *v.* Birm. Can. Co., 27 Law J., Exch. 25.

(*h*) Lawrence *v.* Gt. North. Rail. Co., 16 Q. B. 653; 20 Law J., Q. B. 293. Bagnall *v.* Lond. & North.-West. Rail. Co., 31 Law J., Exch. 121. Barber *v.* Nottingham and Grantham Rail. Co., 33 Law J., C. P. 193.

precautions for the protection of the public whilst the bridge was open And if such a bridge is left open by boatmen using the canal, and a passenger traversing the highway falls into the canal and is injured, the canal company will be responsible for the injury in an action for negligence(*i*).

Where a municipal corporation was authorized by statute to lay down gas-pipes, and an action was brought against them for an injury to the plaintiff's eye, by reason of the negligence of a servant of the corporation, who had been employed by them to chip a gas-pipe, and the corporation pleaded that the injury was done in the execution of their Local Improvement Act, and without any neglect or mismanagement of the defendants otherwise than by their workman, and that the workman employed by them was well skilled and qualified, it was held that the plea was no answer to the action(*j*).

If persons authorized by statute temporarily to close a public highway by mistake stopped up the wrong thoroughfare, or if they have continued an obstruction in a public thoroughfare beyond the time authorized by statute, and an adjoining householder or shopkeeper sustains a particular injury beyond what is sustained by the public at large; if he loses his customers, or his trade is injured by the unauthorized obstruction, there is a remedy by action for damages(*k*).

Where a railway company was authorized to make an embankment for carrying their railway across a valley, through which the waste waters from the adjoining land flowed away, and the embankment was made without proper openings and culverts for the passage of the waste water, by reason whereof the flood water was penned back after heavy rains, and forced upon the plaintiff's land and injured his crops, it was held that the plaintiff was entitled to an action for damages. "It is contended by the defendants," observes Patteson, J., "that they have constructed their railway according to the provisions of their Act of Parliament, and that they are not liable for any consequences which may follow to the damage of the plaintiff; and the question is, whether the company are protected by their Act? Here the company might, by executing their works with proper caution, have avoided the injury which the plaintiff has sustained; and we think that the want of such caution is sufficient to sustain the action"(*l*). And this

(*i*) Manley *v.* St. Helen's Canal and Rail. Co., 2 H. & N. 840; 27 Law J., Exch. 164.

(*j*) Scott *v.* Mayor, etc., of Manchester, 1 H. & N. 59; 2 H. & N. 204.

(*k*) Wilkes *v.* Hungerford Market Co., 2 Sc. 462, 463; 2 B. N. C. 281. See as to this case, Ricket *v.* Metrop. Rail. Co., L. R., 2 H. of L. Ca. 188.

(*l*) Lawrence *v.* Gt. North. Rail. Co., 16 Q. B. 653, 654; 20 Law J., Q. B. 293. Broadbent *v.* Imp. Gas. Co., 26 Law J., Ch. 281. Blagrave *v.* Waterworks Co., 1 H. & N. 369. Sutton *v.*

is so, even though the injury might not have happened but for the fault of others in not keeping an outfall for the water of the dimensions which they, and not the defendants, were bound to keep it(*m*). Where a trading company was incorporated by statute for the purpose of manufacturing gas, and was authorized to make gas to light the streets of a town, it was held that the statute did not authorize the company to make gas so as to create a nuisance, and therefore that they were liable, notwithstanding the statute, to an action for damages for making gas so as to create a nuisance(*n*).

1042 *Nuisances from the negligent working of railways.*—It does not follow that because a railway company is authorized to carry its railway across or alongside a public carriage-road, that it is thereby authorized to conduct its traffic so as to create a nuisance. The company is not responsible for unavoidable noises caused by its engines(*o*); but if the engine-driver unnecessarily puts on the whistle, or unnecessarily lets off steam, or discharges mud or water when crossing or running alongside a public carriage-road, and by so doing frightens horses lawfully traversing the highway, and causes them to upset a carriage, the railway company will be responsible for the damage done(*p*).

So, if the property of the plaintiff adjoining a railway has been set on fire and destroyed by a spark from a locomotive engine and furnace, which the railway company is authorized by statute to use on their railway, the railway company is *primâ facie* responsible for the damage done, for the Acts of Parliament authorizing railway companies to run locomotive steam furnaces through the country, do not authorize them to scatter sparks or lighted coals upon the adjoining land, to the injury of the proprietors thereof, if by any means their engines can be prevented from so doing(*q*).

1043 *Duties and responsibilities of boards of public works, trustees, and commissioners—Contractors and workmen acting in the exercise of statutory*

Clarke, 6 Taunt. 42. Grocers' Co. *v.* Donne, 3 Sc. 357. Brine *v.* Gt. West. Rail. Co., 31 Law J., Q. B. 101. Bagnall *v.* Lond. and North-West. Rail. Co., *ante*, p. 883. Brown *v.* Cayuga and Susquehanna R. R. Co., 12 N. Y. 486. But see Bellinger *v.* New York Central R. R. 23 N. Y. 42. The right of a railroad corporation to the use of its road-bed as an easement carries with it the obligation to keep a culvert unobstructed, so as to avoid, as far as practicable, damage to adjoining land. West *v.* Louisville, etc., R. R. Co., 8 Bush. (Ky.), 404. See Louisville, etc., R. R. Co. *v.* Hodge, 6 Bush. (Ky.), 141.

(*m*) Harrison *v.* Gt. North. Rail. Co., 33 Law J., Exch. 266.

(*n*) Broadbent *v.* Imp. Gas Light Co., 26 Law J., Ch. 280.

(*o*) Rex *v.* Pease, 4 B. & Ad. 30.

(*p*) Manch. and Altring. Rail. Co. *v.* Fullarton, 14 C. B., N. S. 54.

(*q*) Freemantle *v.* Gt. North. Rail. Co., 31 Law J., C. P. 12. Dimmock *v.* North Staff. Rail. Co., 4 F. & F. 1058. See *ante*, p. 302; Baltimore, etc., R. R. Co. *v.* Dorsey, 27 Md. 19; Webb *v.* Rome, etc., R. R. Co., 49 N. Y. 420.

powers.—Trustees and commissioners of public works having certain public duties to perform under the authority of a statute, incur no personal responsibility for their acts if they act within the strict line of their duty; but if they order a thing to be done which is not within the scope of their authority(*r*), or are themselves or by their servants guilty of negligence or misconduct in doing that which they are empowered to do, they render themselves liable to an action. If an action is brought against contractors and workmen who are personally engaged in the execution of public works, under the order or authority of trustees, or a board of public works, and the damage of which the plaintiff complains is the inevitable result of the execution of a public work under statutory authority, the action will fail; but if the damage arises from the negligent execution of the work, and might have been avoided by the exercise of proper skill and care, the contractors and workmen, or the trustees, etc., as the case may be (see *infra*), will be personally answerable for the damage done(*s*)

Where an action was brought by the plaintiff against one of several trustees under a turnpike act, who had joined in an order made by the trustees for cutting a drain through certain lands, whereby considerable damage had been done to the plaintiff's estate, and it appeared that the trustees had acted in the execution of statutory powers, in the best mode they could, under competent advice, and in the faithful execution of the duties imposed upon them by the Legislature, it was held that they were not personally responsible for the damage done(*t*); but where the act authorized to be done by the trustees is done so carelessly and improperly that the careless or improper manner in which it is done either increases the damage or creates it, then the trustees will be liable, if the work has been done by their own servants, or persons acting under their immediate orders. Where the trustees of a public road covered over an open drain by the roadside, and thereby caused an accumulation of water in the road, which flooded the adjoining land, and ran into and swamped the plaintiff's colliery, it was held that the trustees were responsible in damages for the injury(*u*).

If the act done is in itself lawful, it can only become unlawful in

(*r*) Reg. *v.* Longton Gas Co., 29 Law J., M. C. 118.

(*s*) Jones *v.* Bird, 5 B. & Ald. 837. Clothier *v.* Webster, 12 C. B., N. S. 790; 31 Law J., C. P. 317.

(*t*) Sutton *v.* Clarke, 6 Taunt. 42. Grocers' Co. *v.* Donne, 3 Sc. 357; 3 B. N. C. 34. Herring *v.* Metrop. Board of Works, 34 Law J., M. C. 224. Coe *v.* Wise, *post*, p. 888.

(*u*) Whitehouse *v.* Fellowes, 30 Law J., C. P. 305.

consequence of the negligent and improper manner in which it is executed(*v*).

When commissioners intrust the execution of public works to contractors, engineers and surveyors, who select their own workmen for the execution of the work, the commissioners are not personally liable for the mistakes or negligence of the contractors, engineers, or workmen(*x*). So trustees of turnpike-roads, in whom the soil of the highway is not vested, and who are not in possession thereof (*ante*, p. 349), are not personally responsible for the negligence of contractors and those employed by the contractors in the repair of the roads, unless they personally interfere in the management of the works(*y*). But if trustees and commissioners of public works, acting within their jurisdiction, and exercising powers given them by Act of Parliament, act wantonly and oppressively, and do unnecessary injury to individuals, they are personally responsible in damages to the parties injured. Thus, where an action was brought against certain commissioners of pavements for so raising a pavement as to obstruct the plaintiff's doors and windows, and it appeared that the commissioners were acting in the exercise of statutory powers, but that proper advice had not been taken, and the works were improperly executed, and the injury done to the plaintiff might have been readily avoided by laying down the pavement in a proper manner, it was held that the commissioners were personally responsible in damages for the nuisance they had unnecessarily and wantonly created(*z*).

Public commissioners and trustees who continue in the actual occupation of public works constructed and maintained for the use of the public, and in receipt of the tolls levied for the use thereof, are bound, as we have seen, to maintain and manage their property so that it may not become a source of danger to those who are invited to use it(*a*). But if they have demised the property to a lessee, who is in the actual use and occupation of it, and in receipt of the tolls, it is not then the duty of the commissioners or trustees to maintain the works in a safe and secure state, unless the particular statute under which they act imposes that duty upon them(*b*). Whenever an Act

(*v*) Boulton *v.* Crowther, 2 B. & C. 709. Governor, etc., of Cast Plate *v.* Meredith, 4 T. R. 796.

(*x*) See *ante*, pp. 508-510.

(*y*) Humfreys *v.* Mears, 1 M. & Ry. 187. Duncan *v.* Findlater, 6 Cl. & Fin. 894.

(*z*) Leader *v.* Moxon, 2 W. Bl. 926; 3 Wils. 461.

(*a*) Gibbs *v.* Trust. Liv. Docks, 27 Law J., Exch. 321; 3 H. & N. 164; 35 Law J., Exch. 225; *ante*, pp. 222, 252.

(*b*) Walker *v.* Goe, 3. H. & N. 395; 27 Law J., Exch. 427.

of Parliament imposes upon commissioners, or upon any public body, the duty of maintaining or repairing a highway or any public work, and special damage is sustained by a particular individual from the neglect of the public duty, an action for damages is maintainable against such commissioners or public body(*c*), unless there are provisions in the statutes creating them for limiting their liability(*d*), or the duty of repairing the highway, etc., is not absolute(*e*); the rule being, that in the absence of something to show a contrary intention, the Legislature intends that the body, the creature of the statute, shall have the same duties, and that its funds shall be rendered subject to the same liabilities, as the general law would impose on a private person doing the same things(*f*). And this, whether they have or have not funds at their disposal for effecting the repairs; though if there be no funds, there may be a difficulty in the way of the plaintiff's getting his damages(*g*).

Whenever injury is sustained from the non-repair of water-pipes, fire-plugs, drains, or works erected for the use or accommodation of the public, the liability to make compensation for the injury arising from such neglect rests with the parties upon whom the duty of repairing is imposed(*h*).

1044 *Surveyors of highways and county bridges* are not responsible in damages to travellers who have sustained injury from the highway or bridge being out of repair(*i*). Nor is a local board in whom the highways have been vested by the Public Health Act, 1848, 11 & 12 Vict. c. 63 (see ss. 68 & 117), so liable, *i.e.*, for mere misfeasance in omitting to repair, simply as surveyors(*j*). But a local board of health discharging the duties of surveyor of highways under s. 117 of 11 & 12 Vict. c. 63, is liable for the negligence of themselves or their servants in leaving heaps of stones, etc., unlighted at night, though it seems doubtful whether they would be, if the negligence was that of their surveyor appointed under s. 37, as he is not removable at their pleasure, but only on the approval of the General Board

(*c*) Gibbs *v.* Trustees of Liverp. Docks, 35 Law J., Exch. 225; L. R., 1 App. Ca. 93.

(*d*) Young *v.* Davis, 31 Law J., Exch. 256.

(*e*) Wilson *v.* Mayor of Halifax, L. R., 3 Exch. 114.

(*f*) Per Blackburn, J., Mersey Dock Trustees *v.* Gibbs, L. R., 1 App. Ca. 110.

(*g*) Hartnall *v.* Ryde Improvement Commissioners, 33 Law J., Q. B. 39. Bush *v.* Martin, 33 Law J., Exch. 17. Ohrby *v.* Ryde Commis , 33 Law J., Q. B. 296. Coe *v.* Wise, L. R., 1 Q. B. 711. If they are in possession of land, it may be taken under a writ of elegit. Worrall Water-works Co. *v.* Lloyd, L. R., 1 C. P. 719.

(*h*) Bayley *v.* Wolverhampton Water-works Co., 6 H. & N. 241; 30 Law J., Exch. 57.

(*i*) Young *v.* Davis, 31 Law J., Exch. 250; 2 H. & C. 197. M'Kinnon *v.* Penson, 9 Exch. 609. See Parsons *v.* St. Matthews, Bethnal Green, L. R., 3 C. P. 56.

(*j*) Gibson *v.* Mayor of Preston, L. R., 5 Q. B. 218.

of Health(*k*). The proper remedy for the non-repair of a highway is by indictment against the parish, but a surveyor of highways is responsible, like any other person, for any negligent act of his own, creating a nuisance, and causing injury to another (*ante*, pp. 506–508). The only legitimate way in which a parish can do an act is by convening a vestry, and duly conducting the proceedings therein to their legitimate termination, by show of hands, or by poll, when a poll is duly demanded. If, therefore, a poll is demanded and refused, and a resolution carried by show of hands, the resolution so carried cannot be safely acted upon as being the resolution of the parish, for a ratepayer has a right, at common law, to obtain the sense of the parish by means of a poll, and this right cannot be taken away by any general words in a statute respecting the taking the sense of a vestry(*l*).

1045 *Effect of clauses in particular statutes exonerating persons from all personal liability in respect of things done in the bonâ fide execution of the statute.*—By s. 140 of the Public Health Act, 1848 (11 & 12 Vict. c. 63), it is enacted, that no matter or thing done by the local board of health, nor by any superintending inspector, or any member of the local board, or by the officer of health, clerk, surveyor, inspector of nuisances, or other officer or person acting under the direction of the local board, shall, if the matter or thing were done *bonâ fide* for the purpose of executing the Act, subject them, or any of them personally, to any action, liability, claim, or demand whatsoever, and any expense incurred by such local board, member, officer of health, etc., acting as last aforesaid, shall be borne and repaid out of the general district rates levied under the authority of the Act.

Similar provisions are to be found in other statutes respecting matters or things done by commissioners, or by any clerk, surveyor, or other officer or person acting under the direction of such commissioners, and, in some cases, the saving clause is added, "unless the action, suit, damages, costs and charges have arisen in consequence of wilful neglect or default on the part of the commissioners, or person incurring the same."

The effect of clauses of this sort is not to leave a complaining party remediless, but to oblige him to bring his action against the public board, or against the commissioners in a body, in the name of their clerk, in which case the liability would not be personal; and any dam-

(*k*) Foreman *v.* Mayor, etc., of Canterbury, L. R., 6 Q. B. 214.
(*l*) White *v.* Steele, 12 C. B., N. S., 408; 31 Law J., C. P. 265.

ages that might be recovered would be payable out of the funds at their disposal under the provisions for the payment of damages and costs, recovered in any such action against the clerk(*m*). Thus, where certain commissioners for the improvement of a town, acting under the powers of the Public Health Act, made a new sewer communicating with the plaintiff's drain, and neglected to take proper precautions to prevent the plaintiff's premises from being flooded by storm waters, and by inundations from an adjoining river, which communicated with the new sewer, it was held that the plaintiff was entitled to maintain an action against the clerk of the commissioners, for the recovery of all the damage he had sustained by reason of the negligence of the commissioners, and that these damages were to be paid out of the rates levied under the Act(*n*).

But protecting clauses of this sort do not exempt contractors and workmen from personal liability in respect of the negligent performance of work intrusted to them to execute. Where there is no negligence, a person doing the act in obedience to the commissioners or the board would be properly absolved, and the board would have to make compensation; but if he has been guilty of negligence in doing the act, and damage ensues, he is personally liable for the consequences, notwithstanding the statute, for he cannot pretend that negligence was ordered or directed by the commissioners or board(*o*).

1046 *Right of commissioners, trustees and public officers to indemnify themselves in respect of the costs and expenses they incur out of the public funds they are authorized to administer.*—Wherever a duty is imposed by statute upon public officers, and costs incidentally arise in questioning the propriety of acts done in the fulfilment of that duty, the commissioners and public officers have a right to defray those expenses out of the funds they are authorized to administer, and they may in general levy a rate to defray such expenses(*p*). And wherever necessary expenses are incurred in the execution of a trust, or in the performance of duties thrown on any persons, and arising out of the situation in which they are placed, such persons are entitled, without any express provision for that purpose, to make the payments required to

(*m*) Ward *v.* Lee, 7 Ell. & Bl. 430; 26 Law J., Q. B. 142. Southampton and Itchin Bridge Co. *v.* Southampton Local Board, etc., 8 Ell. & Bl. 801, 812; 28 Law J., Q. B. 41; *post*, s. 2. Bush *v.* Martin, *ante*, p. 888.

(*n*) Ruck *v.* Williams, 3 H. & N. 308; 27 Law J., Exch. 357. Allen *v.* Hayward, 7 Q. B. 960. Gt. West. Rail. Co. of Canada *v.* Braid, 1 Moore's P. C. Ca. N. S. 101.

(*o*) Arthy *v.* Coleman, 6 W. R. 35; 30 Law T. R. 101. Newton *v.* Ellis, 24 Law J., Q. B 337.

(*p*) Rex *v.* Commissioners, etc., for Tower Hamlets, 1 B. & Ad. 232. Rex *v.* Essex, *ante*, p. 865.

meet those expenses out of the funds in their hands belonging to the trust(*q*). But the expenses must be such as have been legitimately and properly incurred by the persons intrusted with the administration of the fund in the *bonâ fide* and necessary discharge of the duties imposed upon them(*r*). If they embark in reckless litigation, or exceed the powers and authorities conferred on them by the statute, although with the best intentions, and for the public benefit, or are guilty of any wilful personal misconduct in incurring the expenses they have incurred, they cannot charge them on the public funds at their disposal, for funds raised under the authority of a statute are liable only for acts done strictly in pursuance of the directions of that statute, and cannot be applied in satisfaction and discharge of liabilities arising from wilful misconduct, gross mistake, or wilful neglect of duty. "Such damages are to be paid out of the pocket of the wrongdoer, and not from a trust-fund"(*s*).

1047 *When expenses incurred through blunders or negligence may be charged upon a public or trust-fund.*—In respect of all acts *bonâ fide* done by commissioners or local boards acting in the execution of the Public Health Act and divers statutes for the improvement of towns and the construction of public works, but erroneously done, and causing damage to others, the commissioners or members are liable, and the expenses they are put to in consequence thereof they have authority to discharge out of the public funds. "It is said," observes Lord Campbell, "that it is a great hardship on the ratepayers to be made to pay for the blunders or negligence of the board. That objection, however, seems to be met by the consideration that the members of the board are elected by the ratepayers, and are, therefore, their representatives; and there would be greater injustice, perhaps, if it were held that persons injured by the negligence or wrongful acts of the board had no remedy"(*t*).

1048 *Creation of nuisances in the bonâ fide exercise of statutory powers.*—Where certain contractors, acting under the directions of the Metropolitan Commissioners of Sewers, altered a sewer communicating with the plaintiff's drain, and thereby caused a nuisance to the plaintiff, for which he brought an action against the contractors, and the jury, in

(*q*) Att.-Gen. *v.* Mayor of Norwich, 2 Myl. & Cr. 425. Lewis *v.* Mayor, etc., of Rochester, 30 Law J., C. P. 169.

(*r*) Reg. *v.* Mayor of Sheffield, L. R., 6 Q. B. 652.

(*s*) Duncan *v.* Findlater, 6 Cl. & Fin. 908. Heriot's Hospital Feoffees *v.* Ross, 12 Cl. & Fin. 513.

(*t*) Southampton & Itchin Bridge Co. *v.* Southampton Local Board, 8 Ell. & Bl. 812; 26 Law J., Q. B. 41.

answer to a question left them by the judge, found that the contractors had, in making the sewer, acted *bonâ fide* under the orders and directions of the commissioners, it was held that the contractors were absolved from all personal liability for the nuisance. "The object of the Legislature," observes Wightman, J., "seems to have been in such a case not to leave the complaining party remediless, but to oblige him to bring his action against the commissioners as a body in the name of their clerk, in which case the liability would not be personal; and any damages that might be recovered would be payable out of funds at their disposal under the provisions of the 125th section, which provides for the payment of the damages and costs recovered against the clerk in any such action "(*u*). Here there was no evidence of any negligence on the part of the contractors, the sewer having been properly constructed by them under the orders of the commissioners, and the nuisance to the plaintiff being the natural and necessary result of the making of the sewer.

Whenever the mischief is the natural and necessary result of the doing of the act ordered to be done, and not the result of some collateral or negligent act not ordered, the maxim *respondeat superior* applies(*v*).

1049 *Pollution of streams and injuries to docks, wharfs, towing-paths, etc., in the exercise of statutory powers.*—By the Public Health Act (11 & 12 Vict. c. 63), s. 145, it is enacted, that nothing contained in the Act shall be construed to authorize a local board of health to use, injure, or interfere with any watercourse, stream, river, dock, basin, wharf, quay, or towing-path, in which the owner or occupier of any lands, mills, mines, or machinery, or the proprietors or undertakers of any canal or navigation, shall or may be interested, without consent in writing first had and obtained. Where, therefore, a local board of health constructs drainage works and pours the filth from public sewers into streams or watercourses running through the private grounds of adjoining landowners, they cannot shelter the ratepayers or the public funds at their disposal from the consequences of the creation of the nuisance by showing that they acted in the exercise of the statutory powers conferred upon them(*x*). Generally speaking, where local boards are authorized and required to execute drainage works in a particular district, and to make compensation to parties sustaining injury therefrom, they have no power to collect together the sewage

(*u*) Ward *v.* Lee, 7 Ell. & Bl. 430.
(*v*) Hole *v.* Sittingbourne, etc., Rail. Co., 30 Law J., Exch. 81.
(*x*) Att-Gen. *v.* Luton Local Board, 2 Jur. N. S. 180. Manchester, Sheff., etc., Rail. Co. *v.* Worksop Board of Health, 23 Beav. 198.

and pour it into streams which were previously pure, so as to create a nuisance and deteriorate the value of the adjoining land. A power to take possession of streams, and to cover over open watercourses for drainage purposes, and to give compensation therefor, gives to the board no power by implication to pollute water which was previously substantially pure(*y*).

Although the inhabitants of a town may have a right to open their sewers into a river, in the natural course of drainage, this does not entitle them to foul the water with the contents of water-closets, and convert a sweet and limpid stream into a stinking sewer. The ordinary right of sending house-drainage into streams and natural watercourses, is like the right of drainage which exists in the case of adjoining mines upon different levels. "From the necessity of the case, every owner of a mine must submit to the inconvenience of having the water of an adjoining mine upon a higher level descend upon his mine, so long as it descends in the natural course of drainage (*ante*, p. 71); but that does not entitle the owner of the adjoining mine to throw upon him, in some other and more objectionable way, water which might be allowed to descend upon him in a modified form, not occasioning the same amount of injury to his property "(*z*).

1050 *Creation of nuisances in the exercise of the statutory powers contained in the Towns Improvement Clauses Act.*—By 10 & 11 Vict. c. 34, s. 24, power is given to commissioners and public bodies intrusted with the execution of the powers of the Act, to construct sewers for the drainage of towns, and to carry such sewers through inclosed and other land, making full compensation to the owners and occupiers thereof, and to cause such sewers to empty themselves into the sea or any public river, or to cause the refuse from such sewers to be conveyed to a convenient site for sale, for agricultural or other purposes, but *so that the same shall in no case become a nuisance.* And by s. 107 it is further enacted, "that nothing in the Act contained shall be construed to render lawful any act or omission on the part of any person which is, and but for the Act would be deemed to be, a nuisance at common law." If, therefore, commissioners, trustees, or any body corporate, intrusted with the exercise of the powers of this statute, create a nuisance by their system of drainage, they may be restrained by injunction from continuing the nuisance(*a*).

(*y*) Cator *v.* Lewisham Board of Works, 34 Law J., Q. B. 75.
(*z*) Wood, V.-C., Att.-Gen. *v.* Borough of Birmingham, 4 K. & J. 512.
(*a*) Att.-Gen. *v.* Borough of Birmingham, 4 Kay & J. 543. Att.-Gen. *v.* Corporation of Leeds, L. R., 5 Ch. App. 583.

1051 *The Metropolis Local Management Act*, 18 & 19 Vict. c. 120(*b*), provides (s. 86), that where any work by any vestry or district board, done, or required to be done, in pursuance of the provisions of the Act, interferes with, or prejudicially affects, any ancient mill, or any right connected therewith, or other right to the use of water, full compensation shall be made to all persons sustaining damage thereby, in manner thereinafter provided; or it shall be lawful for the vestry or board, if they think fit, to contract for the purchase of such mill, or any such right connected therewith, or other right to the use of water. If any vestry or district board, in the exercise of the powers conferred upon them by this statute, cause work to be done which is negligently and unskilfully done, and damage is thereby caused to another, it is a proper case for an action or an injunction; but if the work is properly done, and the injury is the natural and necessary result of the doing of the work, it is then a proper case for the statutory compensation(*c*).

1052 *Of the power to take lands and streams for public purposes.*—By the Waterworks Clauses Act, 10 & 11 Vict. c. 17, it is enacted (s. 6), that where by the special Act the undertakers shall be empowered to take or use any lands or streams otherwise than with the consent of the owners or occupiers thereof, they shall, in exercising the power so given to them, be subject to the provisions and restrictions contained in the Lands Clauses Consolidation Act, 1845, and shall make to the owners and occupiers of, and all other parties interested in, any lands or streams taken or used for the purposes of the special Act, or injuriously affected by the construction or maintenance of the works thereby authorized, or otherwise by the execution of the powers thereby conferred, full compensation for the value of the lands and streams so taken or used, and for all damage sustained by such owners, occupiers, and other persons by reason of the exercise, as to such lands and streams, of the powers vested in the undertakers, the amount, except where otherwise directed, to be determined in the manner provided by the Lands Clauses Consolidation Act.

If, therefore, a company, under the powers conferred by this statute, takes the whole stream, it must pay the whole price of it; if it injuriously affects it, compensation must be made in the ordinary way. Before an entire stream can be taken, the company must proceed to have the amount of compensation assessed, and paid or deposited, or

(*b*) See 25 & 26 Vict. c. 102.

(*c*) Stainton *v.* Woolrych, 23 Beav. 223; 6 Law J., Ch. 300. Coats *v.* Clarence Rail. Co., 1 Russ. & M. 181.

security given, in the mode prescribed by the statute; and the court will by injunction restrain them from diverting the stream unless they have complied with the statutory requirements(*d*).

If a company or public board, acting under the powers of the Lands Clauses Act, require only part of a building, etc., they may be compelled to take the whole, and have the value thereof assessed, and paid into court before they take possession of part(*e*). All fixtures, whether they be tenant's or landlord's fixtures, form part of the premises which the company may be required to value and take(*f*).

1053 *Licenses to enter upon land authorized to be taken for public works.*—Where the owners and occupiers of land authorized to be taken for public works have licensed the entry of a public board or company for the purpose of commencing the construction of the works, they cannot revoke the consent once given, and treat their licensees as trespassers, but must resort to the statutory mode for compensation(*g*).

1054 *Seizure and detention of goods by custom-house officers acting in the execution of statutory powers.*—Revenue-officers, acting under an authority given them by statute to examine goods and merchandise, in order to ascertain the amonnt of duty payable upon them, or whether they are goods that may lawfully be imported, are not liable to an action for the seizure or the unlawful detention of the goods, unless the goods are taken and kept an unreasonable time, and there has been a clear abuse of authority on the part of the officers. If they, fairly and honestly believing that goods are liable to seizure, take and detain them, and the decision of the matter is referred to the proper authorities, they are not responsible for the detention of the property, although it may turn out that their judgment in the matter was erroneous, and that the goods ought to have been examined and passed(*h*). By the 8 & 9 Vict. c. 87, s. 116, it is enacted, that if any information or suit shall be commenced or brought to trial on account of the seizure of any vessel, boat, or goods, etc., as forfeited by any act relating to the customs, wherein a verdict shall be found for the claimant, and it shall appear to the judge or court, before whom the same shall have been tried, that there was a probable cause of seizure, such judge or court

(*d*) Ferrand *v.* Corporation of Bradford, 21 Beav. 412.
(*e*) Giles *v.* Lond., Chat., etc., Rail. Co., 30 Law J., Ch. 603.
(*f*) Gibson *v.* Hammersmith Rail. Co., 32 Law J., Ch. 337.
(*g*) Doe *v.* Leeds and Bradford Rail. Co., 16 Q. B. 796; 20 Law J., Q. B. 436. Knapp *v.* Lond., Chat. and Dover Rail. Co., 32 Law J., Exch. 236.
(*h*) Jacobsohn *v.* Blake, 7 Sc. N. R. 784; 13 Law J., C. P. 89. As to detention for freight see 21 & 23 Vict. c. 87, s. 2.

shall certify on the record that there was such probable cause, and in such case the person making the seizure shall not be liable to an action on account of such seizure.

SECTION II.

OF STATUTORY REMEDIES FOR THE RECOVERY OF COMPENSATION FOR INJURIES AUTHORIZED BY STATUTE.

1055 *Injuries establishing a right to statutory compensation.*—Where land has been taken under the provisions of the Lands Clauses Consolidation Act (8 & 9 Vict. c. 18), and the usual warrant has been issued to assess compensation for the land taken, and for severance, and for the land being otherwise injuriously affected, the claimant, the land-owner, is entitled to compensation in respect of the residue of his land being injuriously affected by the execution of the works, although the injury may be of such a nature that an action for damages would not have been maintainable in respect of it, for where the owner is turned out of his property by a company under compulsory powers of purchase, the company is bound to compensate him for *all* the loss occasioned by the expulsion, as in trespass for expulsion(*i*). But where no land has been compulsorily taken from the plaintiff under statutory powers, but the injury complained of has arisen from something done on land which has not been taken by them from the claimant, and the injury would not have formed a ground of action against an ordinary proprietor, if done by him, such injury cannot be made a ground for compensation under the statute(*j*).

Where, therefore, the New River Company, in the exercise of its statutory powers, constructed some underground works on their own land which drew off the water from the plaintiff's well, it was held that the plaintiff was not entitled to compensation under the statute, as the company, in drawing off the water from the well, had not infringed any right of the plaintiff, or done anything which would

(*i*) Jubb *v.* Hull Dock Co., 9 Q. B. 457. *Re* Stockport, etc., Rail. Co., 33 Law J., Q. B. 251. See Duke of Buccleuch *v.* Metrop. Board of Works, L. R., 3 Exch. 307; 5 Exch. 221; 5 Eng. & Ir. App. 418.

(*j*) See Ricket *v.* Metrop. Rail. Co., *post*, p. 903; City of Glasgow Union Rail. Co. *v.* Hunter, L. R., 2 Sc. App. 78.

have rendered them liable to an action at common law, independently of the statute(*k*). A similar decision has been made under the Public Health Act (11 & 12 Vict. c. 63), where the local board of health constructed a sewer, which caused the plaintiff's houses, which, though erected on old foundations, had within twenty years been built of a much more substantial character, to crack(*l*). So, where the tenant of a public-house claimed compensation for the loss of profits he had incurred by reason of a railway company having, under statutory powers, purchased and pulled down the adjoining houses, it was held that he was not entitled to compensation, for if any private person had purchased and pulled down the adjoining property, no action would have lain against them(*m*).

1056 *Of ascertaining the amount of statutory damage by arbitration.*—Most of the Acts of Parliament authorizing the execution of public works which may be productive of injury to private individuals, direct compensation to be paid to all persons who have suffered injury from the execution of the authorized works, and direct the amount of compensation in certain cases, if the amount is disputed, to be referred to arbitration. The reference to arbitration is in many cases made compulsory, for if one party refuses to appoint an arbitrator the other may do so alone. But that is confined to disputes as to amount, and not to the question of liability to make compensation. If that is denied altogether, the question must be referred to the regular tribunals(*n*). An arbitrator has no jurisdiction to determine the question of liability, or any question of damage distinct from the damage naturally resulting from the exercise of the statutory powers, unless the parties mutually consent to refer such matters to him to decide upon(*o*). The award, therefore, merely settles the amount to be recovered, and if the defendant refuses to pay on the ground that he is not liable, the plaintiff must enforce his claim by action, and not by an application to the court to enforce the award(*p*).

The Public Health Act, 1848, 11 & 12 Vict. c. 63, s. 144, gives a right of full compensation out of the general or special district rates to all persons sustaining damage by reason of the exercise of any of

(*k*) New River Co. *v.* Johnson, 29 Law J., M. C. 93. Reg. *v.* Metrop. Board, etc., 33 Law J., Q. B. 105.
(*l*) Hall *v.* Mayor of Bristol, L. R., 2 C. P. 322.
(*m*) Reg. *v.* Vaughan, 38 Law J., M. C. 49; L. R., 4 Q. B. 190.
(*n*) Reg. *v.* Metrop. Commis. of Sewers, 1 El. & Bl. 702.
(*o*) *Re* Byles, 11 Exch. 464. Brandon *v.* Brandon, 34 Law J., Ch. 333.
(*p*) Newbold *v.* Metrop. Rail. Co., 14 C. B., N. S. 405. Reg. *v.* Lond. and North-West. Rail. Co., *post*, p. 904.

the powers of the Act, and directs that in case of dispute as to the amount, the same shall be settled by arbitration(*q*), or be recovered in a summary way before justices, if the sum claimed does not exceed 20*l*. Under the powers of this statute a local board made a sewer, and in so doing cut a trench through the claimant's land, and the local board contended that no damage had been thereby done to the claimant, but the claimant contended that he had sustained damage, and was entitled to compensation, and it was held that this clearly was a dispute as to the amount of compensation to be settled by arbitration, and that if the arbitrator found the damage nominal or infinitesimally small, he might find the amount of compensation to be nil(*r*). But when there is a dispute as to whether the act complained of was done by the local board, or as to some matter of fact which would, if found for the local board, show that there was no liability to make compensation, then the dispute is not within the jurisdiction of the arbitrator.

1057 *Jurisdiction of the arbitrator.*—Parties cannot attend before an arbitrator and go into the inquiry, reserving to themselves the right to contest the jurisdiction of the arbitrator, on the ground that he has not complied with some bare formality, such as the enlargement of the time for making the award. If, therefore, they attend in such a case under protest, the protest is of no avail. But where the objection is a substantial one,—that the arbitrator has no jurisdiction at all over the subject-matter of the inquiry, and no power to decide upon it, *e.g.*, if the time for making his award has expired, or he has misconducted himself, it is otherwise(*s*).

1058 *Damages recoverable before justices of the peace and not by action.*—When an Act of Parliament, authorizing the doing of an act which has been productive of injury to another, provides, that if the parties cannot agree upon the amount of compensation, the same shall be settled and ascertained by order of one or more justices of the peace, etc., the parties are confined to the specific remedy given by the statute, and have no choice of any other tribunal to settle the amends in any case within the Act(*t*); but if the powers of the Act have been exceeded, or the thing authorized to be done has been negligently or carelessly done, and the damage is the result of negligence, then an action for damages must be brought, and the matter is not within the cognizance

(*q*) See Reg. *v.* Wallasey Local Board, 38 L. J., Q. B. 217.
(*r*) Bradby *v.* Southampton Local Board, 4 El. & Bl. 1018.
(*s*) Ringland *v.* Lowndes, 33 Law J., C. P. 30; *S. C.* in error, p. 337.
(*t*) Boyfield *v.* Porter, 13 East, 208.

of the statutory tribunal appointed for settling the amount of statutory compensation(*u*). Under the Towns Improvement Clauses Act (10 & 11 Vict. c. 34), The Railway Clauses Consolidation Act (8 Vict. c. 20), the Metropolis Local Management Act (18 & 19 Vict. c. 120), and other statutes authorizing the construction of public works, it is provided that certain statutory expenses therein specified may be recovered as damages(*x*); and by other sections of these statutes it is provided, that when damages are to be paid they are to be ascertained before justices. These clauses creating the right and providing a specific remedy, impose upon the parties seeking to avail themselves of the provisions of the statute the obligation of following the particular remedy given, and no other(*y*), unless the statutory remedy does not extend to and cover the whole right(*z*).

Giving an appeal to the court of quarter-sessions will not oust the Queen's courts of their jurisdiction(*a*).

1059 *Of the statutory remedy for the recovery of compensation under the provisions of the Lands Clauses and Railway Clauses Consolidation Acts.*—The 8 & 9 Vict. c. 18, commonly called the Lands Clauses Consolidation Act, 1845, consolidates into one Act certain provisions to be thereafter incorporated into Acts of Parliament, relative to the acquisition of lands required for undertakings or works of a public nature, and to the compensation to be made to the owners or occupiers of, or parties interested in, such lands, for any damage that may be sustained by them by reason of the execution of the works authorized by statute. If the claim for compensation by such persons is under 50*l.*, it is to be settled (s. 22) by two justices; if it exceeds 50*l.*, the claimant may elect (s. 23) to have it settled by arbitration, or by the verdict of a jury (ss. 24–49), or, in cases of railways, by the trial of an issue (*post*, p. 900). The General Compensation Clause (s. 68) provides that if any party shall be entitled to compensation in respect of any lands, or of any interest therein(*b*), which shall have been taken for, or injuriously affected by, the execution of the works, and for which satisfaction has not been made, and the compensation claimed exceeds 50*l.*, such party may have the same settled by arbitration or the verdict of a jury, as

(*u*) Clothier *v.* Webster, 12 C. B., N. S. 790; 31 Law J., C. P. 316. Whitehouse *v.* Fellowes, *ante*, p. 886.

(*x*) See Herring *v.* Metrop. Board of Works, 34 Law J., M. C. 224, as to damage by obstructing access to house.

(*y*) Mayor, etc., of Blackburn *v.* Parkinson, 28 Law J., M. C. 7.

(*z*) Shepherd *v.* Hills, *ante*, p. 49. Bogg *v.* Midland Rail. Co., *post*, p. 901.

(*a*) Leader *v.* Moxon, 2 W. Bl. 924; 3 Wils. 461; *ante*, p. 854.

(*b*) This does not extend to an agreement for sporting, Bird *v.* Gt. Eastern Rail. Co., 34 Law J., C. P. 366; unless, perhaps, it be by deed; ibid.

he shall think fit. And if lands required or taken for the purposes of the undertaking, or injuriously affected thereby, are in the possession of a person having no greater interest therein than that of a tenant for a year or from year to year(*c*), and such person be required to give up possession of the whole or of part of such lands before the expiration of his interest therein(*d*), the amount of compensation is, if the parties differ, to be settled (s. 121) by two justices. The general words of the 68th section of the statute, therefore, are restricted by s. 121, so that the proceedings in cases falling within the latter section must be in the mode there prescribed(*e*). But where no part of the land of a tenant from year to year is required to be given up, but is merely injuriously affected by the execution of the works of a railway, the claim to compensation is regulated by s. 68 of the statute, and does not come within the restrictive operation of s. 121(*f*). The fact that the works cannot be executed without the consent of some third person, who owns the land on which the works are to be made, does not render the consent of such third person, when given, equivalent to an agreement to give up his land voluntarily, but such third person will still be entitled to claim as for lands compulsorily taken(*g*).

By another statute, 8 & 9 Vict. c. 20, commonly called the Railway Clauses Consolidation Act, consolidating into one Act sundry provisions to be introduced into Acts of Parliament thereafter passed, authorizing the construction of railways, it is provided (s. 6), that in exercising the power given to the company to construct a railway, the company shall make to the owners and occupiers of, and all other parties interested in, any lands taken or used for the purposes of a railway, or injuriously affected by the construction thereof, full compensation for the value of the lands so taken or used, and for all damage sustained by such owners, occupiers, and other parties, by reason of the exercise as regards such lands of the powers vested in the company, the amount of compensation to be ascertained and de-

(*c*) See Tyson *v.* Mayor of London, L. R., 7 C. P. 18.

(*d*) A notice to treat under s. 18 is not equivalent to requiring possession under this section. R. *v.* Stone, L. R., 1 Q. B. 529. But it is a statutable agreement upon which, if not duly carried out, an action for damages and a mandamus may be sustained. Morgan *v.* Metrop. Rail. Co., L. R., 3 C. P. 553; 4 ibid. 97; and it is no defence to such an action that the whole capital of the company has not been subscribed, as required by s. 16 of the Lands Clauses Act, that section only applying to lands *compulsorily* taken. Guest *v.* Poole and Bournemouth Rail., L. R., 5 C. P. 553. See Richmond *v.* North Lond. Rail. Co., L. R., 5 Eq. Ca. 352; *S. C.* 3 Ch. App. 679; Harding *v.* Metrop. Rail., L. R., 7 Ch. App. 154.

(*e*) Reg. *v.* Manchr., etc., Rail. Co., 4 Ell. & Bl. 103. Knapp *v.* Lond., Chat. & Dover Rail. Co., 32 Law J., Exch. 236. Reg. *v.* Lord Mayor of London, L. R., 2 Q. B. 292.

(*f*) Somers, *In re*, 31 Law J., Q. B. 261.

(*g*) Thames Conservators *v.* Victoria Station Rail. Co., L. R., 4 C. P. 59.

termined in the manner provided by the Lands Clauses Consolidation Act. In cases to which the Lands Clauses Act does not apply, as, for instance, where, the lessee of lands taken by a company is entitled to a right of renewal, the Court of Chancery has jurisdiction to decide between the claimant and the company(*h*).

If the claimant or the railway company prefer it, they may, at any time before the issue of the writ to the sheriff, apply to a judge of a superior court of common law for the trial of the question between them, by directing an issue in such form, and to be tried at such place, etc., as he shall direct, and the proceedings in respect of such issue shall be subject to the jurisdiction of the court, but the jury nevertheless must, where the issue relates to land purchased, and injury done to other land held therewith, deliver their verdict separately, as provided by the 49th section of the Lands Clauses Act; 31 & 32 Vict. c. 119, ss. 41, 42, 43.

The statutory remedy provided by these Acts of Parliamant is substituted in lieu of the ordinary remedy by way of action, so that parties aggrieved by anything done in the exercise of the powers granted by the statute, must follow the statutory remedy, and cannot resort to an action for damages(*i*). The fact of the claimant being entitled to the compensation he seeks is a condition precedent to his right to avail himself of the machinery provided by s. 68 of the Lands Clauses Consolidation Act. If, therefore, the claimant has no title to compensation, the whole proceedings before the arbitrator or a jury are *coram non judice*(*k*), of which the company are entitled to avail themselves in answer to an action on the award(*l*).

In cases of railway compensations, it has been held that the occupier of a house and shop adjoining a railway, is entitled to the statutory compensation for damage sustained by him in consequence of the dust and dirt from the railway works having penetrated his shop and damaged his goods(*m*), or from the obstruction to the access of light and air to ancient windows, provided in all these cases that the act causing the injury has been authorized to be done by Act of Parliament, and has been judiciously and carefully done in the exercise of the statutory powers.

(*h*) Bogg *v.* Midland Rail. Co., L. R., 4 Eq. Ca. 310. Shepherd *v.* Hills, *ante*, p. 899.

(*i*) Watkins *v.* Gt. North. Rail. Co., 16 Q. B. 968. Jolly *v.* Wimbledon, etc., Rail. Co., 31 Law J. C. P. 96. Chamberlain *v.* West End, etc., Rail. Co., 31 Law J., Q. B. 201.

(*k*) R. *v.* Cambrian Rail. Co., L. R., 4 Q. B. 320.

(*l*) See Hooper *v.* Bristol Port Railway Company, 35 Law J., C. P. 299; Beckett *v.* Midland Railway Company, L. R., 1 C. P. 241.

(*m*) Knock *v.* Metrop. Rail. Co., L. R., 4 C. P. 131. East and West India Docks *v.* Gattke, 8 Mac. & G. 155; 20 Law J., Ch. 17.

Wherever real property is depreciated in value by the construction of a railway, and the depreciation is caused by that being done which, but for the powers contained in the Act of Parliament, would have been actionable as between the landowner and the company, that is a case for compensation under the provisions of the statute, and for the adoption of the statutory remedy, to the exclusion of an action at common law. Thus, if a private way of the landowner has been obstructed, although an easement only(*n*), or his enjoyment thereof infringed or rendered less convenient by reason of the private way being crossed by a railroad, and obstructed by railway gates, or the means of access to his house or land from the highway has been rendered less convenient from a road being raised or lowered(*o*), or the light coming to his house has been impeded(*p*), a case for the statutory compensation is made out(*q*). But in the case of injury to adjoining houses by the vibration caused by trains running in the ordinary manner without negligence, after the line is opened for traffic, or by the noise and smoke of the trains, it is now held that, although the right of action is taken away, there are no provisions either in the Lands Clauses or Railway Clauses Act under which a person whose house is so injured can recover compensation(*r*). And where a highway has been diverted or rendered less convenient, by being narrowed for instance(*s*), and premises abutting thereon have been rendered less suitable for shops or a public house(*t*), or where a public turnpike-road is crossed by a railway, and no special damage has been sustained thereby, and no injury or inconvenience, different in kind, although it may be greater in degree, has been suffered by a complaining party than that which is common to all the Queen's subjects passing along

(*n*) Duke of Buccleuch *v.* Metrop. Board of Works, *ante*, p. 696.

(*o*) See Reg. *v.* St. Luke's, L. R., Q. B. 572; 7 ibid. 148.

(*p*) Eagle *v.* Charing Cross Rail. Co., L. R., 2 C. P. 638; and it makes no difference that the value of his house has not been lessened, owing to the increase of value by reason of the proximity of the railway. *S. C.*

(*q*) Glover *v.* North Staff. Rail. Co., 16 Q. B. 923. Moore *v.* Gt. South and West. Rail. Co., 10 Ir. C. L. Rep. 46. Chamberlain *v.* West End of Lond., etc., Rail. Co., 32 Law J., Q. B. 173.

(*r*) Brand *v.* Hammersmith Rail. Co., L. R., 1 Q. B. 130; 2 ibid. 223; 4 Eng. & Ir. App. 171; 38 Law J., Q. B. 265. City of Glasgow Union Rail. Co. *v.* Hunter, L. R., 2 Sc. App. 78. See Lond. and North-West. Rail. Co. *v.* Bradley, 6 Rail. Cas. 556; 3 Mac. & G. 336. Reg. *v.* Cambrian Rail., *ante*, p. 16.

(*s*) However, if the narrowing of the road sensibly interferes with the light and air coming to a house, so that it is worth less to let, as a house, and not with reference to any particular trade, etc., carried on in it, that is "injuriously affecting" it within the statute. Beckett *v.* Mid. Rail. Co., L. R., 3 C. P. 82. City of Glasgow Union Railway Co. *v.* Hunter, L. R., 2 Sc. App. 78. So, if a roadway be substituted for a waterway, Duke of Buccleuch *v.* Metrop. Board of Works, L. R., 3 Exch. 306; 5 Exch. 221; 5 Eng. & Ir. App. 418. Or if a waterway has been stopped up, M'Carthy *v.* Met. Board, L. R., 7 C. P. 508.

(*t*) Rex *v.* London Dock Co., 5 Ad. & E. 163.

such public highway, there is no ground for statutory compensation, for no action for damages would be maintainable(*u*).

1060 *Of statutory compensation to tenants and occupiers of lands taken for public works.*—In the case of lands under lease required for railways or undertakings of a public nature, it is enacted (8 & 9 Vict. c. 18), that every lessee shall be entitled to receive compensation for damages done to him in his tenancy by reason of the severance of his land for the purposes of the undertaking, or otherwise, by reason of the execution of the works authorized by statute, and that if any such lands be in the possession of any person having no greater interest therein than as a tenant from year to year, and such person be required to give up possession before the expiration of his interest, he shall be entitled to compensation for the value of his unexpired term or interest, and for any just allowance which ought to be made to him by an incoming tenant, and for any loss or injury he may sustain; or, if a part only of such lands be required, compensation for damage done to him in his tenancy by severing the lands held by him, or otherwise injuriously affecting the same. A lessee, therefore, who has been obliged to give up his house and business for the purpose of a railway, is entitled to compensation for the loss he sustains in giving up his business, until he can get other suitable premises for carrying it on(*x*).

1061 *Notices by claimants of the nature and extent of the injury sustained, and of the amount of compensation required.*—Every owner and occupier whose land has been taken by a public company for public purposes under statutory powers, or whose land has been injuriously affected by the execution of works of a public nature authorized by statute, must give notice in writing to the railway or other company, declaring whether he desires a settlement by arbitration or by the verdict of a jury, stating in such notice the nature of his interest in the lands in respect of which he claims compensation, and the amount claimed by him, *i.e.*, such particulars of his estate or interest as will enable the company to form a proper judgment respecting the claim(*y*). If he desires an arbitration and gives the requisite notice, and the compensation claimed is not paid, or agreed to be paid, he will be entitled to

(*u*) Caledonian Rail. Co. *v.* Ogilvy, 2 Macq. Sc. App. 23. Ricket *v.* Metrop. Rail. Co., L. R., 3 H. of L. Ca. 175; 34 Law J., Q. B. 257 (overruling Senior *v.* Metrop. Rail. Co., 32 Law J., Exch. 25; and Cameron *v.* Charing Cross Rail. Co., 33 Law J., C. P. 313). Lond. and North-West. Rail. Co. *v.* Smith, 1 Mc. & G. 216. Reg. *v.* Metrop. Board of Works, 38 L. J., Q. B. 201.

(*x*) Jubb *v.* Hull Dock Co., 9 Q. B. 443. Chamberlain *v.* West End, etc., Rail. Co., 31 Law J., Q. B. 201.

(*y*) Heeley *v.* Thames Valley Rail. Co., 34 Law J., Q. B. 55. Cameron *v.* Charing Cross Rail. Co., 33 Ibid. C. P. 313.

have the amount of the compensation settled by arbitration pursuant to the provisions of the statute(z). If, on the other hand, he desires to have the amount of the compensation settled by the verdict of a jury, and gives the requisite notice (s. 68), and the amount claimed is not paid, or agreed to be paid, the railway company is bound, within twenty-one days after the receipt of the notice, to direct the sheriff(a) to summon a jury for settling the amount of compensation in the manner provided by the statute, and in default thereof the company is liable to pay the party injured the amount of compensation claimed, and the same may be recovered by action in any of the superior courts(b).

Where the owner of land taken by a railway company gave notice under s. 68 of this statute of his desire to have the amount of compensation settled by a jury, and before the expiration of the twenty-one days limited by that section for the company to issue their warrant to the sheriff to summon the jury, the owner gave a second notice of his desire to have the question settled by a special jury under s. 54, which fixes no time for the issuing of the warrant, it was held that the company were bound to issue their warrant for the special jury within twenty-one days after the receipt of the first notice, or pay the compensation claimed(c). If the company do not, within a reasonable time after notice, issue their warrant to the sheriff, an action for a mandamus under the Common Law Procedure Act, 17 & 18 Vict. c. 125, may be sustained(d).

1062 *Assessment of damages.*—It is not competent to the sheriff's jury to determine the right of a claimant to compensation. It is for the court to decide upon the right or title of the party to be compensated, and for the jury to settle the amount, so that the amount has to be tried first and the title last(e). Neither the jury nor an arbitrator has any jurisdiction to inquire into collateral matters, creating a head of damage distinct from the damage flowing from the exercise of the statutory powers, unless the parties mutually consent to refer such matters to them for their decision(f). And in an action on the award

(z) 8 & 9 Vict. c. 18, ss. 25–37; *ante*, p. 897.
(a) If the sheriff is interested, see *ante*, p. 778.
(b) 8 & 9 Vict. c. 18, s. 68.
(c) Glyn v. Aberdare Rail. Co., 6 C. B., N. S. 359; 28 Law J., C. P. 271.
(d) Fotherby v. Metrop. Rail. Co., L. R., 2 C. P. 188. Morgan v. Metrop. Rail. Co., L. R., 3 C. P. 553.
(e) Reg. v. Lond. and North-West. Rail. Co., 3 El. & Bl. 465. Read v. Vict. Station and Pim. Rail. Co., 33 Law J., Exch. 170. Horrocks v. Metrop. Rail Co., 4 B. & S. 315.
(f) *Re* Byles, 11 Exch. 464; 25 Law J., Exch. 53.

the arbitrator may be examined, to prove what was the subject-matter into which he was inquiring, and upon which his judgment was founded, but not as to the motives which induced him to arrive at the particular sum awarded(*g*). Where the value of the claimant's estate is increased by a particular covenant, such enhanced value must be taken into account in assessing the compensation(*h*). If part of a man's land be taken, and part of the remainder be severed from the rest, and such part have a prospective value for building purposes, although then used as agricultural land, the owner is entitled to compensation for it as if access were absolutely cut off, and without regard to the power of justices to order accommodation works, under ss. 68 and 69, which only apply to agricultural land(*i*). If land be taken subject to restrictive rights, rendering it of little or no value to the owner, as, for instance, to a right of way, or if a churchyard which has been closed under an Order in Council be taken, the amount of compensation is assessed with reference to the value of the owner's interest therein, and not with reference to its value to the persons taking it(*k*).

1063 *Future damages.*—The jury have no right to assess prospective damages, unless there be an actually existing cause of damage proved before them. The provision respecting future damage is, that the jury shall assess the sum of money to be paid by way of recompense for the future temporary or perpetual continuance of any recurring damage which shall have been occasioned by the exercise of the powers thereby granted. A cause of damage, therefore, must exist in some work of the company already done, to give the jury the power of computing the future damage. They then know what the injury is at present, how often it may accrue, and from these data they have the power of making a contingent assessment of damages. When no injury has been actually done, there is nothing in respect of which future damages can be assessed(*l*). When the amount of damage to be sustained in future years is not capable of being ascertained, and depends upon a variety of contingencies which may or may not occur, the compensation cannot be assessed at once and for ever in respect of this future contingent injury. But when it is capable of being known

(*g*) Duke of Buccleuch *v.* Metrop. Board of Works, *ante*, p. 896. *Re* Dare Valley Rail. Co., L. R., 6 Eq. Ca. 429.
(*h*) Bourne *v.* Mayor of Liverpool, 33 Law J., Q. B. 15.
(*i*) Reg. *v.* Brown, L. R., 2 Q. B. 630.
(*k*) Stebbing *v.* Metrop. Board of Works, L. R., 6 Q. B. 37.
(*l*) Parke, B., Lee *v.* Milner, 2 M. & W. 841.

and estimated, it ought to be brought forward, and the amount of compensation assessed at once and for ever(*m*). See *post*, p. 909.

The cases relating to railways seem to establish that compensation is given in respect of the calculable damage caused, or to be caused, in or by the execution of the permanent works of the company authorized by the statute, such as obstructing private ways, injuring lights, etc., and not the uncertain prospective damage or injury which may or may not result from the use of the railway after it has been constructed(*n*). Thus where the plaintiff and a railway company, before a railway was constructed, referred to arbitration the sum to be paid by the company for the purchase of part of the plaintiff's land, and as compensation for all injury and damage to his remaining estate by severance or otherwise, it was held that the compensation awarded related only to all damage known or contingent by reason of the construction of the railway on the land purchased, and to such other damage arising from the construction of the railway as was apparent and capable of being ascertained and estimated at the time when the compensation was awarded, that it did not embrace contingent and possible damages which might arise afterwards, and which could not at the time have been foreseen by the arbitrator, and that the plaintiff was entitled, notwithstanding the award, to claim compensation for such damages(*o*).

1064 *Assessment of damages to which the claimant is not legally entitled—Removal of the inquisition by certiorari.*—If upon an inquisition of damages resulting from the execution of works done under the authority of an Act of Parliament, the under-sheriff has directed the jury to assess and include in their verdict damages for an item which they ought not to have included, and there is reasonable evidence that they did include such an item in making their calculation, a certiorari clearly lies, inasmuch as the jury have thus committed an excess of jurisdiction; and the excess of jurisdiction may be shown upon affidavits, and need not appear upon the face of the proceedings. Thus, where it was shown by affidavit that the under-sheriff directed the jury that they might give compensation in respect of an alleged nuisance resulting from persons standing on a railway platform, which had been con-

(*m*) Rex *v.* Leeds and Selby Rail. Co., 3 Ad. & E. 690. Reg. *v.* Aire and Calder Nav. Co., 32 Law J., Q. B. 337. Croft *v.* Lond. and North-West. Rail. Co., 32 Law J., Q. B. 113.

(*n*) Broadbent *v.* Imp. Gas Co., 26 Law J., Ch. 281.

(*o*) Lawrence *v* Gt. North. Rail. Co., 16 Q. B. 643; 20 L. J., Q. B. 293. Brand *v.* Hammersmith Rail. Co., *ante*, p. 902; Bagnall *v.* Lond. & N. W. Rail. Co., 7 H. & N. 423; 31 Law J. Exch. 153.

structed under statutory authority near the plaintiff's dwelling-house, and thence overlooking the plaintiff's premises, it was held that the nuisance was not a legitimate subject of compensation; that the jury had exceeded their jurisdiction in giving compensation in respect of it, and as they had given one lump sum for the damage done, the court quashed the inquisition(*p*). Wherever, therefore, several items of claim are brought under the consideration of a sheriff's jury, and it is doubtful whether they are all legitimate subjects of compensation, the proper course is for the under-sheriff to direct the jury to find separately upon each item, to guard against the quashing of the whole inquisition.

1065 *Recovery of the amount of compensation assessed by a jury.*—Although the verdict of the jury and the judgment are made records, they are not made records of any superior court, nor is there any express provision for any writ of execution to issue for enforcing them. The consequence is, that an action must be resorted to for recovering the amount(*q*).

1066 *Declarations in actions for railway compensations.*—The plaintiff's declaration in an action for the amount of compensation assessed by a sheriff's jury under 8 & 9 Vict. c. 18, s. 68, usually sets forth the plaintiff's possession of a house or land, that it was injuriously affected by the execution of the works and the construction of the railway, and that the plaintiff was entitled to compensation; whereupon he gave notice to the railway company, stating the nature of his interest in the land, and the amount of compensation claimed by him pursuant to the statute in that behalf, that the plaintiff claimed to have the amount settled by a jury, that a jury was duly impanelled and sworn, and the parties having appeared and given evidence before them, the jury assessed the amount of compensation for the injury to the house at, etc., and for the injury to (stating any other legal injury), at, etc., amounting in the whole to the sum of £——, and that the sheriff gave judgment for that sum to be paid to the plaintiff according to the provisions of the said statutes, and that the verdict and judgment were duly deposited with the clerk of the peace, by whom the same were kept among the records of the court of quarter sessions, yet the defendants had not paid to the plaintiff the said sum of £——, or any part thereof(*r*).

(*p*) *Re* Penny, 7 Ell. & Bl. 660; 26 Law J., Q. B. 225. Reg. *v.* South Wales Rail. Co., 18 Q. B. 394. Caledonian Rail. Co. *v.* Ogilvy, 2 Macq. 229.

(*q*) Coleridge, J., Reg. *v.* Lond. and North-West. Rail. Co., 3 Ell. & Bl. 466.

(*r*) Chapman *v.* Monm. Rail, etc., Co., 11 Exch. 267; 27 Law J., Exch. 97.

1067 *Pleadings—Defences—Traverse of the injury to the land.*—The finding of the sheriff's jury on an inquisition under s. 68 of the Lands Clauses Consolidation Act (8 & 9 Vict. c. 18) is not conclusive; and, therefore, in an action brought on such an inquisition, it is competent to the defendants to traverse the allegation that the plaintiff's property was damaged or injuriously affected by the construction of the railway, or by the exercise of the powers vested in the company, within the meaning of the Act, and that the plaintiff was entitled to compensation under the provisions of the statute in respect of the same having been damaged or injuriously affected; or to plead these facts, and to prove that the subject-matters of the claim submitted to the determination of the sheriff's jury are not such as are contemplated by the 68th section(*s*).

If the sheriff's jury had any jurisdiction over the subject-matter of the inquiry, and power to award compensation to the plaintiff, the defendants cannot afterwards, in an action upon the judgment, set up as a defence that there was an excess of jurisdiction as to some part of the claim. In an action upon the judgment, it must be taken that there was jurisdiction, and the quantum of it cannot be investigated, for if that could be done the plaintiff would have to go down to trial prepared to prove each part of his claim, and such a course would be most inconvenient. Where, therefore, an action was brought upon a judgment following an inquisition found before the sheriff in a proceeding by the plaintiff to obtain compensation for an injury done to his premises by works carried on under the authority of an Act of Parliament, and the defendants sought to bar the action, and prevent the plaintiff from recovering, by proving that part of the damages was given in respect of an injury arising from the cutting off some water to which the plaintiff had no legal title, it was held that no such defence was open to the defendants in that action, and that if the sheriff's jury had improperly taken upon themselves to give damages in respect of the loss of the water, the matter should have been set right by certiorari, and the inquisition quashed(*t*).

1068 *Remedy for subsequent unforeseen damages.*—In respect of all damages which can be foreseen and ascertained at the time of the inquiry, there can be no further compensation. The assessment must "be

(*s*) Chapman *v.* Monm. Rail., etc., Co., *ut sup.* Reg. *v.* Lond. & North-West. Rail. Co., 3 Ell. & Bl. 468. Read *v.* Vict. Station & Pim. Rail. Co., 32 Law J., Exch. 167. Barber *v.* Notting. & Grantham Rail. Co., 33 Law J., C. P. 193. Hooper *v.* Bristol, etc., Rail. Co., Beckett *v.* Mid. Rail. Co., *ante*, p. 902.

(*t*) Mortimer *v.* South-West. Rail. Co., 1 Ell. & Ell. 382; 28 Law J., Q. B. 139. Corrigal *v.* Lond. and Blackwall Rail. Co., 5 M. & Gr. 245.

once for all; finally; for all time"(*u*); but if, after compensation has been obtained for the known calculable injury, damage has been sustained which could not have been foreseen, and this damage is the natural and necessary result of the construction of the works authorized by statute, the remedy appears to be by resort to the sheriff's jury, under s. 68 of the Lands Clauses Consolidation Act(*x*). Thus, if some violent storm has destroyed a portion of the earthworks of a railway, or if there has been a subsidence or fall of an embankment from purely accidental causes, and the accident and its reparation have caused injury to an adjoining landowner, the claim for compensation seems to fall within the compensatory clause of the statute. "The damage resulting from the reparation of a mischief of this sort," observes the Lord Chancellor, "appears to me to be damage strictly arising from the carrying on of the works, and as much within the Lands Clauses Consolidation Act as if it had occured before the opening of the railway. I see no difference between the title to compensation of a person who has sustained loss by an unexpected land-slip, whether the accident happened before the line was opened, or two or three days, or two or three weeks, subsequently to that period"(*y*). See *ante*, p. 906. Where an Act of Parliament(*z*) provided that no action or proceeding should be commenced *against* the Metropolitan Board of Works till after notice, and that "every such action and proceeding should be brought and commenced within six months next after the accrual of the cause of action or ground of claim or demand, and not afterwards," it was held, that those words referred to some hostile claim against the Board, and not to a claim of arbitration for damage to buildings caused by the works of the board(*a*).

If, on the other hand, the subsequent injury results from negligence, or want of care and skill in the execution of the authorized works, or from the doing of some wrongful and unauthorized act, or for not doing what an Act of Parliament or a legal obligation requires to be done, the remedy is by action(*b*), for no compensation is given, as previously mentioned, by s. 68 of the Lands Clauses Consolidation Act, or, generally speaking, by any compensation clauses in statutes

(*u*) Croft *v.* Lond. and North-West. Rail. Co., 32 Law J., Q. B. 120.

(*x*) Ware, *In re*, 9 Exch. 402; 7 Rail. Cas. 780. Glover *v.* North Staff. Rail. Co., 16 Q. B. 643. Lond. and North-West. Rail. Co. *v.* Bradley, 3 Mac. & G. 336. See Brand *v.* Hammersmith Rail. Co., *ante*, p. 902.

(*y*) Lanc. and York. Rail. Co. *v.* Evans, 15 Beav. 322.

(*z*) 25 & 26 Vict. c. 102 (s. 106).

(*a*) Delany *v.* Metrop. Board of Works, L. R., 2 C. P. 532; 3 Ibid. 111.

(*b*) Lawrence *v.* Gt. North. Rail. Co., 16 Q. B. 643. Bagnall *v.* Lond. & North-West Rail. Co., 31 Law J., Exch. 121.

authorizing the commission of injurious acts, unless the injury is the natural and necessary result of the doing of the authorized act. If the act is a wrongful act, notwithstanding the statute, the compensation clauses do not apply(*c*); and if the statutory remedy does not apply, an action for damages is, as we have seen, maintainable(*d*).

1069 *Remedy in cases of severance.*—The 128th section of the Lands Clauses Act (8 & 9 Vict. c. 18) provides that, before disposing of the superfluous lands, unless they be "situate within a town, or be lands built upon or used for building purposes," the company shall offer them to the person entitled to the land from which they were originally severed, and in case of his refusal, to the owners of the land adjoining(*e*). Under this section it has been held, that land situate within the limits of a borough, and chargeable and charged with paving, lighting, and other borough rates, and with a cottage upon it, but which was at some distance from the mass of houses forming the town, was not within the meaning of the words "within a town," or "built upon or used for building purposes," although the railway had paid the price of building land for it, and that the original vendors to the company or purchasers from them might, therefore, exercise their right of pre-emption(*f*). But if the land has been actually sold as building land and been laid out for building purposes, or has been let upon building leases, although the houses have not been actually commenced, it is not within the section, and the right of pre-emption will not arise(*g*). This right of pre-emption accrues as soon as the company have clearly shown that the land is superfluous land, *e.g.*, by selling it to another person or otherwise permanently dedicating it to purposes other than those authorized by their Act, although the limit of time mentioned in the 127th section of the Lands Clauses Act, or the company's own Act, within which superfluous lands must be sold, has not yet arrived(*h*). The right accrues to lessees for a long term of years of the adjoining land as well as to owners of the fee(*i*). But it has no application to lands taken by a company for a line which

(*c*) Broadbent *v.* Imp. Gas, etc., Co., 26 Law J., Ch. 280.

(*d*) *Ante*, p. 882 *et seq.* Blagrave *v.* Waterworks, etc., Co., 1 H. & N. 385.

(*e*) If more than one, see Lond. & South-West. Rail. Co. *v.* Blackmore, L. R., 4 Eng. & Ir. App. 610.

(*f*) Carington *v.* Wycombe Rail. Co., L. R., 2 Eq. Ca. 825; 3 Ch. App. 377. London & South-West. Rail. Co. *v.* Blackmore, L. R., 4 Eng. & Ir. App. 610. How in such a case the arbitration to determine the price should be conducted, *quære*?

(*g*) Coventry *v.* L., B. & S. Coast Rail. Co., L. R., 5 Eq. Ca. 104.

(*h*) Lord Beauchamp *v.* Gt. West. Rail. Co., L. R., 3 Ch. App. 745. Lond. & South-West. Rail. Co. *v.* Blackmore, L. R., 4 Eng. & Ir. App. 610.

(*i*) Coventry *v.* L., B. & S. Coast Rail Co., *supra*.

has never been made(*j*). Superfluous lands remaining unsold at the expiration of the time limited by the 127th section vest, under the provisions of that section, in the owners of the adjoining lands(*k*).

1070 *Compulsory purchase of house by railway company.*—The 92nd section of the Lands Clauses Act, 8 & 9 Vict. c. 18, provides that no person shall be required to sell to the promoters "a part only of any house or other building or manufactory," if such person be willing to sell the whole. Where a manufactory was partly worked by water-power supplied by a reservoir, which in its turn was supplied by a goit, into which water was turned from a natural stream at some distance from the manufactory, and at the point where the goit commenced there was a weir, with shuttles to regulate the supply of water to the goit, and a mill-house for the residence of a man to see to the shuttles, and the railway company proposed to take the weir, shuttles, mill-house, and part of the goit, it was held that they must take the manufactory also(*l*). So a vacant piece of land in front of a public-house, not separated by any fence from the street, which had been always treated as passing to the lessee of the public-house under a demise thereof, and formed the only means of approach for vehicles coming to the house, is part of the "house" within the meaning of the section(*m*). But, although the company may be compelled to take whatever is thus necessary for the convenient or profitable occupation of the house or manufactory, they cannot be compelled to take what is necessary only for the personal use or convenience of the owner for the time being. Where, therefore, the plaintiff, the proprietor of a house and six acres of land on one side of a road, bought several acres of land on the other side, upon which he kept cows and horses requisite for his family and establishment, which was a large one, and built, or found built thereon, a cottage, which he used for the residence of his grooms, it was held that the last-named land was not part of his "house" within the meaning of the section(*n*). It makes no difference that the grounds are used partly for ornament and partly for business purposes, *e.g.*, growing plants, etc., for sale, if the company propose to take part of that which is used for ornament and can fairly be considered as part of the house, as a residence(*o*).

(*j*) Smith *v.* Smith, 38 Law J., Exch. 37.
(*k*) See May *v.* Gt. West. Rail., L. R., 7 Q. B. 364.
(*l*) Furniss *v.* Mid. Rail. Co., L. R., 6 Eq. Ca. 473.
(*m*) Marson *v.* Lond., Chat. & Dover Rail Co., ibid. 101.
(*n*) Steele *v.* Mid. Rail. Co., L. R., 1 Ch. App. 275.
(*o*) Salter *v.* Metrop. District Rail., L. R., 9 Eq. Ca. 432

SECTION III.

REMEDIES BY ACTION AND BY INJUNCTION IN RESPECT OF INJURIES FROM THE NEGLIGENT DOING OF THINGS AUTHORIZED TO BE DONE BY STATUTE.

1071 *Limitation of actions in respect of things done under local and personal statutes.*—By 5 & 6 Vict. c. 97, s. 5, it is enacted, that the period within which any action may be brought for anything done under the authority or in pursuance of any local and personal Acts(*p*), shall be two years, or, in case of continuing damage, then the action must be brought within one year after such damage shall have ceased, and so much of any enactment as appoints any other period of limitation is repealed.

1072 *Accrual of the cause of action and commencement of the period of limitation.*—Where the defendant, who was a surveyor of highways, dug into the plaintiff's soil, threw down fences, and erected a wall, and the Highway Act, 13 Geo. 3, c. 78, s. 81, required the action to be brought "within three months after the fact committed, and not afterwards;" and no action was brought within the three months, and after that period had expired, the surveyor raised the wall and finished it, it was held that the raising of the wall was not a fresh fact committed within the meaning of the statute, and would not extend the period of limitation beyond the three months(*q*). But where the cause of injury was a digging in the soil of a street, and the excavation at first produced no injury to the plaintiff, but some months after it had been made, it weakened the foundations of the wall of the plaintiff's house, and caused it to fall, it was held that the falling of the wall of the house constituted the cause of action; that no action was maintainable for the digging in the street until injury to the plaintiff resulted therefrom, and, therefore, that the time of limitation ran from the falling of the wall, and not from the time of the making the excavation(*r*). A continuing excavation of this sort has been said to be a continuing nuisance, constituting a continuing cause of action so long as it is per-

(*p*) See Cock *v.* Gent, 13 Law J., Exch. 24, and *ante*, p. 711.
(*q*) Wordsworth *v.* Harley, 1 B. & Ad. 391.
(*r*) Roberts *v.* Read, 16 East, 217. Bonomi *v.* Backhouse, *ante*, pp. 75, 735; 34 Law J., Q. B. 181. Smith *v.* Thackerah, L. R., 1 C. P. 564.

mitted to exist(s); and so is a continuing obstruction to a watercourse and flow of water(t).

1073 *Of notice of action.*—The words in clauses of Acts of Parliament requiring notice of action to be given "in respect of anything done in pursuance of the Act, or in execution of the powers thereof," apply to all cases where the parties are intending to act upon powers given by the statute, and not merely using it as cloak for their own private purposes(u). Those words do not mean acts done in strict pursuance of the Act, because in such a case a person would be acting legally, and would not require protection. They mean, that a person, to be entitled to the protection, must *bonâ fide* and really believe himself to be authorized by the Act(x). Though he may erroneously exceed the powers the Act gives, or inadequately discharge the duties imposed upon him, yet if he acts *bonâ fide*, in order to execute such powers, or to discharge such duties, he is to be considered as acting in pursuance of the Act, and is entitled to the protection conferred upon persons so acting(y). Whenever, indeed, any action is brought against any one for anything done by the order, direction or authority of a person authorized to act in the matter, under the provisions of a public or a private Act of Parliament, it will generally be found necessary to give notice of action. It must be given in cases of nonfeasance, where the person, having undertaken to act in pursuance of some statute, has failed to do what he ought to have done; as well as in cases of misfeasance, where he has acted negligently or wrongfully in the execution of the Act(z). The notice must state positively that an action will be brought, and must in general state the cause of action(a).

Notice of action is required only where the action is brought for a tort or a quasi tort, and not for a breach of a specific contract(b).

1074 *Notice of action to gas companies and trading corporations and their officers.*—The right to notice of action has been extended by numerous Acts of Parliament to all sorts of trading corporations, joint-stock companies and associations called into existence by statute for a variety

(s) Holroyd, J., Howell v. Young, 5 B. & C. 268. Gillon v. Buddington, Ry. & M. 164.
(t) Whitehouse v. Fellows, 30 Law J., C. P. 305.
(u) Oakley v. Kensington Canal Co., 5 B. & Ad. 139. Beechey v. Sides, 9 B. & C. 809.
(x) Hughes v. Buckland, 15 M. & W. 353. Gaby v. Wilts Canal Co., 3 M. & S. 580; *ante*, p. 712.
(y) Smith v. Wiltshire, 2 B. & B. 620. Smith v. Shaw, 10 B. & C. 284.
(z) Joule v. Taylor, 7 Exch. 58. See per Blackburn, J., L. R., 6 Q. B. 84. And see *ante*, p. 711 *et seq.*
(a) Mason v. Birkenhead Com., etc., 6 H. & N. 72; 29 Law J., Exch. 406.
(b) Wightman, J., Davis v. Curling, 8 Q. B. 293. Fletcher v. Greenwell, 4 Dowl. P. C. 166, Davis v. Mayor, etc., of Swansea, 22 Law J., Exch. 297.

of local and private purposes, and purposes of gain, so that whenever an action of tort is brought against a company or association which is incorporated or regulated by statute, or derives its powers from some special Act of Parliament, or against the officers of any such company or association, it will, in general, be necessary to give notice of action. This will be found to be the case in actions against many of the gas companies or their officers for things done by them under the powers or in pursuance of their several Acts of Incorporation, also against certain railway companies(*c*) when there has been an omission of some duty imposed upon the company by the Act, such as the non-repair of fences, or the charging or levying excessive tolls under the powers of their Act of Incorporation(*d*); but when the action is brought against them for a breach of their duty as common carriers, no notice of action is requisite(*e*).

Neither the Lands Clauses nor the Companies Clauses Consolidation Act, however, contain any section requiring notice of action to be given to companies in respect of things done by them under the authority of those statutes; but s. 141 of the Companies Clauses Act (8 & 9 Vict. c. 16), and s. 135 of the Lands Clauses Act (8 & 9 Vict. c. 18), entitle the company to a verdict, if before action they tender sufficient amends.

1075 *Notice of action to toll and tax-collectors and revenue-officers.*—Notice of action also is required to be given in respect of things done by toll-collectors on turnpike-roads acting in pursuance of the General Turnpike Act(*f*), or certain special Acts of Parliament authorizing the collection of toll(*g*), or by revenue-officers(*h*), tax-collectors(*i*), or commissioners and other persons acting in the execution of the several Acts relating to the land-tax(*j*). If the officer has reasonable grounds for thinking that his duty required him to do the injurious act complained of, he is entitled to notice of action(*k*). If a toll or tax, though not legally payable, is demanded *bonâ fide* by a collector, who intends to act right, and has fair and reasonable grounds for believing that he has a right to demand the money, the collector is entitled to the statutory protection, and

(*c*) Carpue *v.* Lond. and Brighton Rail. Co., 5 Q. B. 747.
(*d*) Kent *v* Gt. West. Rail. Co., 3 C. B. 725.
(*e*) Palmer *v.* Grand Junction Rail. Co., 4 M. & W. 766. Garton *v.* Gt. West. Rail. Co., E. B. & E. 837, 846.
(*f*) 3 Geo. 4, c. 126.
(*g*) Waterhouse *v.* Keen, 4 B. & C. 200.
(*h*) Greenway *v.* Hurd, 4 T. R. 553.
(*i*) 43 Geo. 3, c. 99, s. 70.
(*j*) 5 & 6 Wm. 4 c. 20, s. 19. Thomas *v.* Williams, 13 Law J., Exch. 87.
(*k*) Daniel *v.* Wilson, 5 T R. 1.

must have notice of action(*l*). But if a revenue-officer, toll or tax-collector, improperly, and without color of right, extorts money by virtue of his office, and in plain and manifest abuse of the statute under which he acts, he will then lose the statutory protection, and will not be entitled to any notice of action. If he makes an improper seizure of goods, and then takes money as a bribe to deliver them up again, there is no statutory protection(*m*). If he makes a wholly unauthorized charge, and is guilty of manifest extortion under a threat of legal proceedings, or the pressure of a distress(*n*), he cannot shelter himself under the provisions of the statute.

1076 *Notice of action against contractors, etc., under Local Boards of Health.*—A contractor who contracts with a Local Board of Health for the digging of drains and wells and making excavations, is a person acting under the direction of the board within 11 & 12 Vict. c. 63, s. 139, and is entitled to notice of action for digging a hole in a public thoroughfare, and leaving it unguarded and without a light, although the board might not be liable for the contractor's act(*o*). So a contractor is entitled to notice of action, under the Metropolis Local Management Amendment Act, 25 & 26 Vict. c. 102, who, in enlarging a sewer, under a contract with the Metropolitan Board of Works, has dammed it up, although he has been guilty of negligence in not pumping away the sewage water which had accumulated, and which in consequence flowed into the plaintiff's house(*p*). But where the injury is caused by the negligence of his servant, in leaving his cart unattended in the public streets, and the horse runs away and causes damage, he is not entitled to notice(*q*). Nor is a person who receives notice to drain his house under the 106th section of the 25 & 26 Vict. c. 102, and who in so doing commits a trespass by laying the drain-pipe in the land of another, entitled to notice(*r*).

1077 *Notice of action against surveyors and persons acting in execution of the Highway Acts.*—The Highway Act, 5 & 6 Wm. 4, c. 50, s. 109, requires notice of action to be given for anything done in pursuance of the Act. Where, therefore, a surveyor of highways left an obstruction of gravel and sand in a highway, and had notice to remove it, and

(*l*) Waterhouse *v.* Keen, 4 B. & C. 211.
(*m*) Irving *v.* Wilson, 4 T. R. 486.
(*n*) Umphelby *v.* M'Lean, 1 B. & Ald. 42.
(*o*) Newton *v.* Ellis, 5 Ell. & Bl. 115; 24 Law J., Q. B. 337.
(*p*) Poulson *v.* Thirst, L. R., 2 C. P. 443. See Wilson *v.* Mayor of Halifax, L. R., 3 C. P. 114.
(*q*) Whatman *v.* Pearson, L. R., 3 C. P. 422.
(*r*) Doust *v.* Slater, 38 Law J., Q. B. 159.

failed so to do, it was held that he was entitled to notice of action(*s*). And where a highway board, with their surveyor, trespassed upon private grounds, and broke down a private gate in the assertion of a supposed right of way which had no existence, it was held that they were entitled to notice of action. "The defendants," observes Lord Denman, "might believe that they were acting in execution of the power to remove obstructions in public roads without coming to a very irrational conclusion. The argument against it is, indeed, founded on a specific clause, which prescribes a different course of proceeding to this end, but we are not prepared to hold that officers of this description are bound to argue on a comparison of clauses in a long Act, and to decide correctly"(*t*). Wherever, therefore, a surveyor is acting *bonâ fide* in his public capacity as surveyor, he is entitled to notice of action(*u*).

A person acting as surveyor under an appointment in fact, though an informal and illegal one, is, nevertheless, entitled to notice of action if he was acting in what he did in the *bonâ fide* belief that he had been properly appointed(*v*). And so where a surveyor received payment under a informal assessment, made apparently under a repealed Act, but *bonâ fide* intended to act according to the duties of his office, and in pursuance of the statute authorizing him in that behalf(*w*).

1078 *Tender of amends before action.*—The statutes requiring notice of action to be given further provide, as we have seen, that the action shall not be maintainable, and that the jury shall give a verdict for the defendant, if there has been a tender of sufficient amends before action (*ante*, pp. 593, 728). This is the case with the Lands Clauses Act (8 & 9 Vict. c. 18, s. 135); the Railway Clauses Act (8 & 9 Vict. c. 20, s. 139); the Waterworks Clauses Act (10 & 11 Vict. c. 17, s. 84); the Harbors, Docks, and Piers Clauses Act (10 & 11 Vict. c. 27, s. 91); the Towns Improvement Clauses Act (10 & 11 Vict. c. 34, s. 209); the Commissioners Clauses Act (10 & 11 Vict. c. 16, s. 103); the Markets and Fairs Clauses Act (10 & 11 Vict. c. 14, s. 51); the Town Police Clauses Act (10 & 11 Vict. c. 89, s. 72); the Cemeteries Clauses Act (10 & 11 Vict. c. 65, s. 61); the Contagious Diseases (Animals) Act, 1869 (32 & 33 Vict. c. 70, ss. 110–113); and the Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43, s. 68).

(*s*) Davis *v.* Curling, 8 Q. B. 292.
(*t*) Smith *v.* Hopper, 9 Q. B. 1014.
(*u*) Hardwick *v.* Moss, 31 Law J., Exch. 207.
(*v*) Hughes *v.* Buckland, 15 M. & W. 355.
(*w*) Selmes *v.* Judge, L. R., 6 Q. B. 724.

1079 *Parties to be made defendants.*—All persons who have been guilty of negligence or misconduct in the execution of public works under the authority of an Act of Parliament, or who have exceeded the powers intrusted to them(*x*), or who have neglected a public duty imposed upon them by statute, or by the common law, are, as we have seen, liable to be sued by the party injured (*ante*, p. 883 *et seq.*); but if the injury of which the plaintiff complains is the inevitable result of the execution of the authorized Act, the liability will be regulated and governed by the statute. Where an Act of Parliament imposed upon a water-works company the duty of repairing, renewing, and keeping certain fire-plugs in proper order, it was held that it was no answer to an action for damages resulting from a breach of this duty, to show that the fire-plugs were the property of another public body which was required to pay the costs and charges of keeping them in repair(*y*).

Sec. 138 of the Public Health Act, 1848, 11 & 12 Vict. c. 63(*z*), provides that the Local Board of Health of any non-corporate district may be sued in the name of the clerk for the time being concerning any matter or thing whatsoever relating to any matter done by them under the provisions of the Act, and that the clerk shall be reimbursed out of the general district rate all costs and damages. Where public health Acts, or local Acts for the improvement of towns, and the authorization of public works to be effected through the medium of trustees or commissioners, or a board, enact that the trustees or the commissioners, or the board, shall and may sue and be sued in the name of their clerk, it is generally meant that they must so sue and be sued; so that an action for a wrong done in the execution of the Act cannot be brought against individual commissioners or trustees, or individual members of the board. In some cases these statutes require the action to be brought against the clerk(*a*); in others they require the action to be brought against the board in its statutory name, as a quasi-corporate body(*b*). If it is sued in a wrong corporate name the misnomer must be pleaded in abatement.

1080 *Pleadings—Plea of not guilty.*—The 5 & 6 Vict. c. 97, s. 3, repeals so much of any clause or provision in any public local and personal Act, or local and personal Act, or in any Act of a local and personal nature, as enables any party to plead the general issue only, and to give any

(*x*) Reg. *v.* Longton Gas Co., 2 Ell. & Ell. 651.
(*y*) Bayley *v.* Wolverhampton Waterworks Co., 6 H. & N. 241; 30 L. J., Exch. 57.
(*z*) See *ante*, p. 897.
(*a*) Allen *v.* Hayward, 7 Q. B. 796. Buck *v.* Williams, 3 H. & N. 808.
(*b*) Southampton, etc., Bridge Co. *v.* Southampton Local Board, 8 Ell. & Bl. 814. See *ante*, pp. 899-901.

special matter in evidence. The plea of not guilty by statute, therefore, is not available for railway companies, gas companies, trading corporations, local commissioners, or their subordinates, or any persons acting in the execution of local Acts, for the improvement, lighting, and paving of towns, unless there is some special enactment in that behalf overriding the provisions of the last-named statute. And if the defence of the want of notice of action is founded on the provisions of a local and personal Act, it must be specially pleaded, and cannot be given in evidence under the plea of not guilty by statute(*c*). Thus, a railway company, whose local and personal Act requires notice of action to be given to the company, must plead the want of such notice specially(*d*); and persons who claim to have acted under local Acts for paving, lighting, watching, or cleansing towns(*e*), or any of the local and personal Acts requiring notice of action to be given, must plead specially the want of such notice. If upon the face of the declaration of the cause of action there is nothing to show that the action is brought in respect of something done or omitted to be done, in pursuance of the statute, the plea must contain an averment to that effect, and show on the record that the action is brought for some matter or cause of action in respect of which notice of action ought to have been given. If it fails to do this, and the matter does not appear upon the record, the plea will be bad after verdict(*f*).

1081 *Plea of tender of amends before action.*—It is not necessary for a party who pleads a tender of amends before action to pay the money into court, as the tender is not a tender of any debt, but is a matter collateral to the defence. If the plaintiff chooses to renounce the tender, and prefers the chance of what he may gain by verdict, he has no claim to the amount tendered, and if the verdict goes against him he gets nothing(*g*).

1082 *Pleas of justification under the authority of an Act of Parliament.*—When the defence relied upon is that the act complained of was done under the authority of an Act of Parliament, the defendant may justify under the Act, unless the matter of justification is authorized to be given in evidence under a plea of not guilty. When the defendant justifies under the statute, he may plead generally that the several acts, matters, and things of which the plaintiff complains,

(*c*) Davey *v.* Warne, 14 M. & W. 208.
(*d*) Edwards *v.* Gt. West. Rail Co., 11 C. B. 650.
(*e*) Law *v.* Dodd, 17 Law J., M. C. 65.
(*f*) Garton *v.* Gt. West. Rail. Co., E. B. & E. 837, 848.
(*g*) Jones *v.* Gooday, 9 M. & W. 744.

were lawfully done by the defendant in exercise, and by virtue of the powers and authorities given for that purpose to the defendant by an Act of Parliament made, etc., intituled, etc(*h*).

1083 *Evidence at the trial—Proof of notice of action.*—When the statute requiring notice of action to be given specially directs that no evidence shall be given of anything not included in the notice, the plaintiff must prove the giving of the notice, in order to lay a foundation for the other evidence(*i*).

1084 *Power of the Court of Chancery to grant an injunction to prevent unnecessary injury from the execution of statutory powers.*—The statutory right to compensation given by Act of Parliament to persons sustaining injury from the exercise of statutory powers, does not abrogate the regulating and restraining jurisdiction of the Court of Chancery, for nothing would be more pernicious than to leave the large and ample powers so frequently conferred by Act of Parliament free from all control. Persons, therefore, having such powers will be restrained from exercising them so as to inflict avoidable and unnecessary injury upon others. Thus, where a railway company, in the exercise of its statutory powers, commenced the building of a bridge across a mill-race in such a way as to diminish the full force of the current and lessen the working power of the mill, the Lord Chancellor by injunction prevented the erection of any bridge over the stream with arches of less dimensions than those recommended in the report of a particular engineer(*k*). Here it was shown that the bridge was altogether wrongly constructed, and the work negligently and unskilfully done; but where there is no proof of negligence, and the accruing injury arises naturally and necessarily from the doing of what is authorized to be done, the court cannot interfere, but must remit the injured party to the statutory compensation for the damage, where that is provided(*l*).

The court will by injunction restrain public boards and commissioners from doing acts in excess of the statutory powers intrusted to them(*m*), and from carrying out what they may be pleased to call the spirit of the Act in an arbitrary manner(*n*).

(*h*) Beaver *v.* Mayor of Manchester, 8 Ell. & Bl. 44; 26 Law J., Q. B. 311. Watkins *v.* Gt. North. Rail. Co., 16 Q. B. 961. As to the replication to this plea, see Brine *v.* Gt. West. Rail. Co., 21 Law J., Q. B. 101.

(*i*) Johnson *v.* Lord, M. & M. 444; and see *ante*, pp. 876-879; *post*, ch. 21.

(*k*) Coats *v.* Clarence Rail. Co., 1 Russ. & M. 181.

(*l*) Stainton *v.* Metrop. Board, etc., 23 Beav. 223; 26 Law J., Ch. 300. Biddulph *v.* St. George's Vestry, 33 Law J., Ch. 411.

(*m*) Holt *v.* Corporation of Rochdale, L. R., 10 Eq. Ca. 354. Auckland (Lord) *v.* Westminster Local Board, L. R., 7 Ch. App. 597.

(*n*) Tinkler *v.* Wandsworth Board of Works, 1 Giff. 417; 2 De G. & J. 261. Rangeley *v.* Mid. Rail. Co., L. R., 3 Ch. App. 306.

The 68th section of the Railway Clauses Act, 1845 (8 & 9 Vict. c. 20), enacts that the company shall maintain certain works for the accommodation of the owners and occupiers of lands adjoining the railway, such as gates, fences, culverts, drains, watering-places for cattle in certain cases, etc.; and the 69th section enacts that if any difference arises between the company and such owners or occupiers as to the kind, number, size, maintenance, etc., of such works, it shall be determined by two justices. The Court of Chancery, therefore, will, as a rule, refuse to interfere in such cases(*o*).

1085 *Injunction to restrain nuisances created by public bodies acting in the exercise of statutory powers.*—Where commissioners of sewers and boards of health have obtained statutory powers of drainage into rivers, streams, and natural watercourses, the power must be exercised so as not to create a nuisance or interfere with the private rights of individuals(*p*). If a riparian proprietor has a right to enjoy a river so far unpolluted that fish can live in it, and cattle drink of it, and the town council of a neighboring borough, professing to act under statutory powers, pour their house-drainage and the filth from water-closets into the river in such quantities that the water becomes corrupt and stinks, and fish will no longer live in it, nor cattle drink it, the court will grant an injunction to prevent the continued defilement of the stream, and to relieve the riparian proprietor from the necessity of bringing a series of actions for the daily annoyance(*q*).

In deciding on the right of a single proprietor to an injunction, the court cannot take into consideration the circumstance that a vast population will suffer by reason of its interference. "There are cases at law," observes Sir W. P. Wood, V.C., "in which it has been held that where the question arises between two portions of the community, the convenience of one may be counterbalanced by the inconvenience of the other, where the latter are far more numerous. But in the case of an individual claiming certain private rights, and seeking to have those rights protected, the question simply is, whether he has those rights, and not whether a large population will be inconvenienced by measures taken for their protection"(*r*).

1086 *Injunction to prevent misuse by companies and public bodies of land acquired by them under statutory authority.*—Acts of Parliament com-

(*o*) Hood *v.* North-East. Rwy., L. R., 11 Eq. Ca. 116.

(*p*) Cator *v.* Lewisham Board of Works, 5 B. & S. 115. See *ante*, pp. 187, 891 *et seq.*

(*q*) Wood, V.-C., Att.-Gen. *v.* Borough of Birmingham, 4 K. & J., 528. Att.-Gen. *v.* Metrop. Board, etc., 1 H. & M. 298.

(*r*) Att.-Gen. *v.* Borough of Birmingham, *ut sup.* See Raphael *v.* Thames Valley Rail. Co., L. R., 2 Ch. App. 147.

pelling landowners to part with portions of their property for purposes considered beneficial to the public, are regarded as contracts made by the legislature on behalf of all persons interested under them, and the purposes for which the land is taken are of the essence of the contract, so that the landowner may obtain an injunction to restrain the company from taking the land for another and different purpose(*s*), or from devoting it to such purpose, if they have already taken it(*t*). "The principle is this, that when persons embark in great undertakings, for the accomplishment of which those engaged in them have received authority from the legislature to take compulsorily the lands of others, making to the latter proper compensation, the persons so authorized cannot be allowed to exercise the powers conferred on them for any collateral object"(*u*). But although this is so with regard to Acts of Parliament authorizing a company of adventurers, for their own profit, to take compulsorily the lands of others, the case is different where the legislature has entrusted an existing public body, such as the corporation of a city, with the authority to take lands compulsorily for the purpose of public improvements, and not for gain, and in such case a more liberal construction as to the purposes for which the land is taken will prevail(*x*). But they must still, of course, comply with the provisions entitling them to avail themselves of their compulsory powers(*y*). Nor does the same strict construction prevail where land is taken, not compulsorily under a statute, but in pursuance of an option reserved by agreement *inter partes*(*z*).

If any public body authorized to enter land and construct works in the execution of statutory powers, exceed the authority conferred upon them, and do acts *ultra vires*, the court will by injunction restrain their proceedings(*a*), and confine them within the limits of their jurisdiction(*b*), "otherwise the result may be, that after your property has been taken and destroyed, after your house has been pulled down and a railway substituted in its place, you may have the satisfaction of dis-

(*s*) Flower *v.* L., B. and S. Coast Rail. Co., 2 Dr. & S. 330.

(*t*) Bostock *v.* North. Staff. Rail. Co., 3 Sm. &. G. 291; 4 Ell. & Bl. 798. See Carington *v.* Wycombe Rail. Co., L. R., 2 Eq. Ca. 825; 3 Ch. App. 377.

(*u*) Lord Cranworth, in Galloway *v.* Corporation of London, *infra*.

(*x*) Galloway *v.* Corporation of London, L. R., 1 H. of L. 34.

(*y*) Thomas *v.* Daw, L. R., 2 Ch. App. 1.

(*z*) Butt *v.* Imp. Gas Co., L. R., 2 Ch. App. 158. See Carrington *v.* Wycombe Rail Co., *supra*.

(*a*) See Att.-Gen. *v.* Ely, etc., Rail. Co., L. R., 6 Eq. Ca. 106; ibid. 4 Ch. App. 194; 38 Law J. Ch. 258, as to making a more convenient road.

(*b*) Tinkler *v.* Wandsworth District Board, 2 De J. & G. 273. As to contracts *ultra vires*, see Taylor *v.* Chichester and Midhurst Rail Co., 4 H. & C. 409; L. R., 2 Exch. 356; 4 Eng. & Ir. App. 628. If the shareholders have ratified the act, see Phosphate of Lime Co. *v.* Green, L. R., 7 C. P. 43.

covering that the railway company was wrong, and that a pecuniary compensation is the only satisfaction you can receive for the injury"(*c*). Thus, where a local board of health withdrew its opposition to a railway bill, on the insertion of a clause that the bridges within their district were to have a certain gradient, and the company could not make the bridges of such a gradient without encroaching on adjoining lands, against which the adjoining proprietor obtained an injunction, and the company consequently made the bridges of a steeper gradient, the court granted a mandatory injunction to the company to alter the bridges(*d*). So where, by a local Act, commissioners were appointed to pave, drain, and otherwise improve a certain district, and to levy rates for that purpose, the court granted an injunction to restrain them from applying the moneys produced by such rates towards the promotion of a bill in Parliament, the object of which was the extension of their district, although the bill had received the approval of the ratepayers(*e*).

And whenever public bodies, acting in the exercise of statutory powers, have failed to comply with any condition imposed by statute for the protection of the public, the Court of Chancery will, as we have seen, by injunction prevent the exercise of the statutory authority until the condition precedent has been strictly fulfilled(*f*) Thus, it will restrain a railway company from using land for which, and the injury to it, the compensation assessed under the Lands Clauses Act has not been paid, although the railway has been opened for public use(*g*); although in cases where the effect of such an injunction would be to make the land useless to both parties, an injunction will be refused and a receiver appointed instead(*h*); nor will an injunction be granted from running trains over the land until its sale, which has been ordered by the court(*i*). The Court of Chancery has also, it seems, jurisdiction

(*c*) Dun. Nav. Co. *v.* North Mid. Rail. Co., 1 Rail. C. 154.

(*d*) Att.-Gen. *v.* Mid. Kent Rail. Co., L. R., 3 Ch. App. 100.

(*e*) Att.-Gen. *v.* West Hartlepool Improvement Commissioners, L. R., 10 Eq. Ca. 152. See Reg. *v.* Mayor of Sheffield, L. R., 6 Q. B., 652.

(*f*) Gibson *v.* Hammersmith Rail. Co., *ante*, p. 895. Cosens *v.* Bognor Rail. Co., L. R., 1 Ch. App. 594. See Kent Coast Rail. Co. *v.* Lond., Chat. & Dover Rail. Co., L. R., 3 Ch. App. 656. The company would also be liable in trespass if they had taken the plaintiff's land, without performing the statutory conditions. Cranwell *v.* Mayor, etc., of London, L. R., 5 Exch. 284.

(*g*) Walker *v.* Ware, etc., Rail. Co., L. R., 1 Eq. Ca. 195. Field *v.* Carnarvon & Llanberris Rail. Co., L. R., 5 Eq. Ca. 190. St. Germans (Earl of) *v.* Crystal Palace Rail., L. R., 11 Eq. Ca. 568. Stretton *v.* Gt. Western Rail., L. R., 6 Ch. App. 751. The vendor, however, has no lien for the costs of the arbitration. Ferrers (Earl of) *v.* Staff. & Utt. Rail. Co., L. R., 13 Eq. Ca. 524.

(*h*) Pell *v.* Northampton & Banbury Rail., L. R., 2 Ch. App. 100. Munns *v.* Isle of Wight Rail., L. R., 8 Eq. Ca. 653; 5 Ch. App. 414.

(*i*) Lycett *v.* Staff. & Uttox. Rail., L. R., 13 Eq. Ca. 261.

to restrain an application to Parliament to enable a company to abandon the formation of certain lines, and the statutable contracts that they have made thereunder, or to restrain an improper application to Parliament for a private Act, though such a jurisdiction can hardly ever be exercised(*k*). "You cannot restrain a man from going to Parliament on public grounds, . . . but if he is going on in violation of a plain contract, which is personal to himself, with which the public interests have nothing whatever to do, you cannot, under the pretence that he is going to Parliament, refuse the relief which, if there were no question about Parliament, this Court would be bound to give"(*l*).

(*k*) Steele v. North Metrop. Rail. Co., L. R., 2 Ch. App. 287. *Re* Lond., Chat. & Dover Rail. *Ex parte* Hartridge, L. R., 5 Ch. App. 671.
(*l*) Per Bacon, V. C., Telford v. Met. Board of Works, L. R., 13 Eq. Ca. 594.

CHAPTER XVII.

OF LIBEL AND SLANDER(a).

SECTION I.—*Of libel or written slander.*—Distinction between slander by word of mouth and slander in a published writing—Oral slander rendered actionable by being printed and published—Exemption of the author, and liability of the publisher—What writings are libellous and actionable—Of malice—Privileged writings and communications—Defamatory writings in courts of justice—Defamatory petitions to the Queen, to Parliament, or to ministers or officers of state—Criminatory communications made in discharge of a public or private duty—Criminatory pastoral letters—Defamatory letters respecting clergymen—Privileged communications between relations and friends—Privileged communications by persons specially interested in the subject-matter of the communication—Reckless and inconsiderate communications—Disclosures made at the plaintiff's request—Answers to inquiries—Communications between subscribers to a charity—Privileged communications respecting the character of servants—Comments in excess of the privilege—Effect of addressing privileged communications to the wrong person—Reports in newspapers of trials and proceedings preliminary thereto—Reports of speeches in Parliament, or at public meetings—Reviews and criticisms in public papers—Comments upon the public character of public men—Disparaging criticisms by one journalist or tradesman upon another.

SECTION II.—*Of oral slander.*—Defamatory words not actionable without proof of special damage—Defamatory words actionable *per se*—In what cases actionable words are rendered not actionable by precedent or subsequent words—Defamatory words concerning tradesmen and professional men—Words imputing official misconduct—Words rendered actionable by reason of special damage—Slanderous denunciations from the pulpit, causing loss of situation or employment—Effect of the dismissal being a wrongful dismissal—Unauthorized repetition of verbal slander—Privileged communications by word of mouth—Privileged charges and accusations of felony—Privileged statements before magistrates and judicial tribunals—Privileged comments by magistrates and judges—Of the interpretation and application of slanderous words—Slander of title.

SECTION III.—*Of actions and indictments for libel and slander.*—Consolidation of actions—Parties, pleadings, defences and evidence—Damages recoverable—Indictment for libel.

(a) See Starkie on Slander and Libel, 3rd ed. (1869).

SECTION I.

OF LIBEL AND WRITTEN SLANDER.

1087 *Of the distinction between slander by word of mouth and slander in a published writing.*—Slander in writing or in print has always been considered in our law a graver and more serious wrong and injury than slander by mere word of mouth, inasmuch as it is accompanied with greater coolness and deliberation, indicates greater malice, and is in general propagated wider and further than oral slander. Hence words of a depreciatory character, which, if spoken only, would not be actionable, may become so by being put into writing or print and published(*aa*). "There is a very material distinction," observes Gould, J., "between libels and words. A libel is punishable both criminally and by action, when mere speaking the words would not be punishable in either way." For speaking the words "rogue" and "rascal" of any one, an action will not lie; but if these words were written and published of any one, an action would lie(*b*). Merely to call a man a swindler, or a cheat, or dishonest person by word of mouth, is not actionable(*c*), unless it be spoken of him in his trade or business, so as to have damaged him with his customers(*d*); but if such words are published in writing or printing, they are actionable *per se*(*e*). Verbal reflections upon the chastity of a young lady are not actionable, unless they have prevented her from marrying, or have been accompanied by special damage(*ee*); but if they are published in a newspaper, they are at once actionable, and substantial damages are recoverable(*f*).

Before, therefore, a person gives general notoriety to oral calumny,

(*aa*) Bennett *v.* Williamson, 4 Sandf. (N. Y.) 60. Lansing *v.* Carpenter, 9 Wis. 540.

(*b*) Villiers *v.* Mousley, 2 Wils. 403; 5 Co. 125 b. Oakley *v.* Harrington, 1 Johns. Cas. 129. Idol *v.* Jones, 2 Dev. 162. Sturgenegger *v.* Taylor, 2 Brevard, 480. Williams *v.* Carnes, 4 Humph. 9. Ford *v.* Johnson, 21 Geo. 399.

(*c*) Savile *v.* Jardine, 2 H. Bl. 532. Stevenson *v.* Hayden, 2 Mass. 406. Chase *v.* Whitlock, 3 Hill, 139. Wierbach *v.* Trone, 2 Watts & Serg. 408. Neil *v.* Allenhofen, 26 Wis. 708.

(*d*) Bac. Abr. SLANDER, B. Nelson *v.* Borchenius, 52 Ill. 236. See Fowles *v.* Bowen, 30 N. Y. 20.

(*e*) Janson *v.* Stuart, 1 T. R. 748.

(*ee*) Berry *v.* Carter, 2 Stew. & Port. 387. Buys *v.* Gillespie, 2 Johns. 115. Brooker *v.* Coffin, 5 Johns. 188; W. & L., 2 N. & M. 204. Elliot *v.* Allsbury, 2 Bibb, 473. McQueen *v.* Fulgham, 27 Texas, 463. Underhill *v.* Welton, 32 Vt. 40. Linney *v.* Maton, 13 Texas, 449.

But to the contrary, see Mayer *v.* Schleichter, 29 Wis. 646; Haynes *v.* Ritchey, 30 Iowa, 76; Cleaveland *v.* Detweiler, 18 Iowa, 299; Smith *v.* Silence, 4 Iowa, 321; Wilson *v.* Beighler, id. 427; Truman *v.* Taylor, id. 424; Beardsley *v.* Bridgman, 17 Iowa, 290; M'Brayer *v.* Hill, 4 Ired. 136. Snediker *v.* Poorbaugh, 29 Iowa, 488; Richardson *v.* Roberts, 23 Ga. 215; Guard *v.* Risk, 11 Ind. 156; Patterson *v.* Wilkinson, 55 Me. 42; Downing *v.* Wilson, 36 Ala. 717; Adams *v.* Rankin, 1 Duvall (Ky.), 58; Miles *v.* Vanhorn, 17 Ind. 245.

(*f*) Bl. Com., by Christian, 125, n. 6.

by circulating it in print, he must be prepared to prove its truth to the letter; for he has no more right to take away the character of the plaintiff, without being able to prove the truth of the charge that he has made against him, than he has to take his property without being able to justify the act by which he possessed himself of it. "Indeed," observes Best, C.J., "if we reflect on the degree of suffering occasioned by loss of character, and compare it with that occasioned by loss of property, the amount of the former injury far exceeds that of the latter"(*g*).

1088 *Oral slander rendered actionable by being printed and published—Exemption of the author, and liability of the publisher.*—Oral slander uttered under circumstances not rendering it actionable, may therefore become actionable by being printed and published, and the publisher may become responsible in damages for publishing and circulating in writing what would not be actionable so long as it was circulated only by word of mouth. In cases of this sort, the author who has spoken the words is exempt from all legal responsibility, while the man who prints them and circulates them in writing, and all who aid and assist therein, are liable to an action for damages(*h*). "What has been said by word of mouth is known only to a few persons, and, if the statement be untrue, the imputation cast upon any one may be got rid of; the report is not heard of beyond the circle in which all the parties are known, and the veracity of the accuser, and the previous character of the accused, will be properly estimated. But if the report is to be spread over the world by means of the press, the malignant falsehoods of the vilest of mankind, which would not receive the least credit where the author is known, would make an impression which it would require much time and trouble to erase, and which it might be difficult, if not impossible, completely to remove." As to the question of the publisher of a libel being allowed to exonerate himself from the responsibility of the act by naming the author. "Of what use is it," observes Best, J., "to send the name of the author with a libel that is to pass into a part of the country where he is entirely unknown? The name of the author of a statement will not inform those who do not know his character, whether he is a person entitled to credit for veracity or not; whether his statement was made in earnest or by way of joke; whether it contains a charge made by a man of sound mind or the delusion of a lunatic"(*i*).

(*g*) De Crespigny *v.* Wellesley, 5 Bing. 406.
(*h*) M'Gregor *v.* Thwaites, 3 B. & C. 35. Thorley *v.* Lord Kerry, 4 Taunt. 354.
(*i*) De Crespigny *v.* Wellesley, 5 Bing. 403.

It is no defence, therefore, to an action for a libel, to show that a ludicrous narrative in a newspaper concerning the plaintiff was only a repetition of a story told by the plaintiff of himself; "for there is a great difference between a man's telling a ludicrous story of himself to a circle of his own acquaintance, and a publication of it to all the world through the medium of a newspaper"(*j*).

1089 *What writings are libellous and actionable.*—All publications in writing or in print, imputing to another disgraceful, or fraudulent, or dishonest conduct(*k*), or which are injurious to the private character or credit of another(*l*), or tend to render a man ridiculous or contemptible in the relations of private life(*ll*), are libellous, and an action for damages is maintainable against the writer and publisher, unless the publication ranges within that class of communications which are termed privileged communications, presently mentioned, or unless the libeller can prove the truth of the libel. To impute to a landlord that, in putting in a distress, he was colluding with an insolvent tenant, is libellous(*m*). It is a libel, also, to describe a man in writing as an "infernal villain"(*n*), or an "itchy old toad"(*o*), or as being in insolvent

(*j*) Cook *v.* Ward, 6 Bing. 415.

(*k*) Digby *v.* Thompson, 4 B. & Ad. 821. Adams *v.* Lawson, 17 Grat. (Va.) 250. Williams *v.* Carnes, 4 Humph. 9. Dexter *v.* Spear, 4 Mason, 115. Robbins *v.* Treadway, 2 J. J. Marsh. 540.

(*l*) Fray *v.* Fray, 34 Law J., C. P. 45. Johnson *v.* Stebbins, 5 Ind. 364. Adams *v.* Lawson, 17 Grat. (Va.) 250.

(*ll*) Miller *v* Butler, 6 Cush. 71. Johnson *v.* Stebbins, 5 Ind. 364. Adams *v.* Lawson, 17 Grat. (Va.) 250. Armentrout *v.* Moranda, 8 Blackf. 496. Torrance *v.* Hurst, Walker, 403. Newbraugh *v.* Curry, Wright, 47. White *v.* Nicholls, 3 How. (U. S.) 266. State *v.* Henderson, 1 Rich. 179. Dexter *v.* Spear, 4 Mason, 115.

To publish of a man that he is a miserable fellow, that it is impossible for a newspaper article to injure him to the extent of six cents, and that the community could hardly despise him worse than they do now, is libelous. Brown *v.* Remington, 7 Wis. 462.

To write of a person that he is thought no more of than a horse thief and a counterfeiter is libelous. Nelson *v.* Musgrave, 10 Mo. 648.

So it is libelous to charge a person in writing with being a drunkard, a cuckold, and a tory. Giles *v.* State, 6 Geo. 276. A false and malicious publication of an obituary notice of a living person is a libel. McBride *v.* Ellis, 2 Rich. Law (S. C.), 313.

To charge another with having ruined business men with slanderous reports is libelous. Cramer *v.* Noonan, 4 Wis. 231. See Colby *v.* Reynolds, 6 Vt. 489.

And in general, any publication expressed either in printing or in writing, or by signs and pictures, tending either to blacken the memory of one dead, or the reputation of one who is living, and to expose him to public hatred, contempt or ridicule is a libel. Commonwealth *v.* Clapp, 4 Mass. 163, 168.

A publication accusing a person of a crime punishable by law is libelous. Dexter *v.* Spear, 4 Mason, 115.

A false and malicious writing charging a person with being a perjured scoundrel, or containing an insinuation that such person had been guilty of perjury is libelous. Hillhous *v.* Dunning, 6 Conn. 391. Haws *v.* Stanford, 4 Sneed (Tenn.), 520.

(*m*) Haire *v.* Wilson, 9 B. & C. 645.

(*n*) Bell *v.* Stone, 1 B. & P. 331.

(*o*) Gould, J., Villiers *v.* Mousley, 2 Wils. 403.

circumstances and unable to pay his debts(*p*), or as being a mere man of straw(*q*), unfit to be trusted with money(*r*), or as being guilty of ingratitude to his friends and benefactors, although the facts upon which the charge is founded are also stated, and they do not support the charge(*s*), or of misconduct in an office of trust, or of general misconduct, corruption, or neglect of duty in the management of business that has been intrusted to him to execute.

Every publication in writing, imputing insanity to the plaintiff(*t*), or holding him up to public hatred, contempt, or ridicule, or having a tendency to make him feared, or his society shunned and avoided, is a libel. To publish in writing, therefore, of a man that he has been guilty of gross misconduct, and has insulted two females and a gentleman in the most barefaced manner, is a libel(*u*). It is a libel, also, to publish of a person soliciting relief from a charitable society that she prefers unworthy claims, and that she has squandered away the funds of the benevolent in printing circulars abusive of the society's secretary(*v*); or to impute in writing to the captain of a ship that his ship is unseaworthy, as the imputation reflects upon the personal character and professional conduct of the captain. "It is like saying of an innkeeper or tea-dealer that his wine or his tea is poisoned"(*w*). To impute to a physician of character and eminence that he is concerned in vending quack medicines is also libellous; and, therefore, if a vendor of pills falsely advertises his pills as being prepared and furnished by a physician in practice, without the authority of the latter, he is guilty of a libel upon the physician(*x*). But merely to write of a person that he has done something in bad taste or manner(*y*), or that he has kept company unworthy of his position in society, or of his position in his profession, is not actionable(*z*).

To publish falsely in placards or newspapers, or through the medium

(*p*) Metrop. Saloon Omnibus Co. *v.* Hawkins, 4 H. & N. 146; 28 Law J., Exch. 201. See Cox *v.* Lee, L. R., 4 Exch. 284, per Kelly, C.B.

(*q*) Eaton *v.* Johns, 1 Dowl. N. S. 612.

(*r*) Cheese *v.* Scales, 10 M. & W. 488.

(*s*) Cox *v.* Lee, L. R., 4 Exch. 284.

(*t*) Morgan *v.* Lingen, 8 L. T. R., N. S. 800. Perkins *v.* Mitchell, 31 Barb. 461. Southwick *v.* Stevens, 10 Johns. 443.

(*u*) Clement *v.* Chivis, 9 B. & C. 176.

(*v*) Hoare *v.* Silverlock, 12 Q. B. 624.

(*w*) Ingram *v.* Lawson, 8 Sc. 478.

(*x*) Clark *v.* Freeman, 11 Beav. 117. As to injunctions against the publication of libels, see Dixon *v.* Holden, L. R., 7 Eq. Ca. 488; Springhead Spinning Co. *v.* Riley, L. R., 6 Eq. Ca. 561; Mulkern *v.* Ward, L. R. 13 Eq. Ca. 619.

(*y*) But see Jenner *v.* A'Beckett, L. R., 7 Q. B. 11.

(*z*) Clay *v.* Roberts, 11 W. R. 649; 9 Jur. N. S. 580. Terms of mere general abuse published in a newspaper are not libelous. Tappan *v.* Wilson, 7 Ham. 190.

of letters or writings, of a publican, that his license has been refused(*a*), or of a tradesman, that he knowingly sells bad articles, or of a gunsmith or manufacturer, that he is a bad workman and unable to turn out a good gun or other article, is actionable; but mere puffs between rival tradesmen, the one depreciating the other's wares and exalting his own above them, are defensible(*b*). It is a libel, also, to say in writing of the publisher of a newspaper that he is a "libellous journalist," for the words either mean that the plaintiff has been habitually publishing libels in his paper, or that he has permitted them to be published from base and malicious motives. To show, therefore, that the plaintiff has been guilty, on one occasion only, of publishing a libel, is not enough to justify the use of the term "libellous journalist," but the evidence would go in mitigation of damages(*c*).

Where a man complains of a libel, written respecting an illegal transaction in which he is engaged, the illegality of the transaction is an answer to his complaint; but fraud ultra that transaction is not, on that account, to be imputed to him with impunity(*d*). If, therefore, a man is charged in writing with having cheated at dice, he is entitled to recover damages for the libel, although gambling and playing at dice are illegal(*e*).

1090 *Of malice.*—Malice is said to be the gist of an action for defamation or slander, but the word is not used in the popular sense, but in the ense the law puts upon the expression. In every case of ordinary libel, not being a privileged communication, the law implies malice from the very fact of the publication of the defamatory matter. "Malice in common acceptation," observes Bayley, J., "means ill-will against a person, but in its legal sense it means a wrongful act done intentionally without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it of malice, because I do it intentionally, and without just cause or excuse. If I maim cattle without knowing whose they are, or if I poison a fishery without knowing the owner, I do it of malice, because it is a wrongful act done intentionally. And if I traduce a man, whether I know him or not, and whether I intend to do him an injury or not, the law considers it as done of malice, because it is wrongful and intentional. It equally works an injury whether I meant to produce an injury or not, and if I

(*a*) Bignell *v.* Buzzard, 3 H. & N. 217; 27 Law J., Exch. 355.
(*b*) Harman *v.* Delaney, 2 Str. 898. Evans *v.* Harlow, 5 Q. B. 624.
(*c*) Wakley *v.* Cooke, 4 Exch. 518.
(*d*) Best, C.J., Yrisarri *v.* Clement, 3 Bing. 441.
(*e*) Greville *v.* Chapman, 5 Q. B. 744.

had no legal excuse for the slander, there shall be a remedy against me for the injury it produces. And the law recognizes the distinction between these two descriptions of malice,—malice in fact, and malice in law, in actions of slander"(*f*).

Where, therefore, the circumstances under which the communication was made do not present any justifiable occasion for speaking or writing the defamatory matter, or show it to have been done either in pursuance of some duty, or for the purpose of endeavoring to enforce a right, the communication is deemed in law to be malicious; and the circumstance of the jury having negatived actual malice in such cases does not get rid of the effect of legal malice, and does not render the communication justifiable(*g*).

1091 *Privileged writings and communications.*—When a communication is fairly made by one person to another in the discharge of some public or private duty, whether legal, moral, or social, or in the conduct of his own affairs in matters where his interest is concerned, "the occasion," observes Parke, B., "prevents the inference of malice, which the law draws from unauthorized communications, and affords a qualified defence, depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society, and the law has not restricted the right to make them within any narrow limits"(*h*). "The rule," observes Lord Campbell, "is, that if the occasion be such as repels the presumption of malice, the communication is privileged, and the plaintiff must then, if he can, give evidence of actual malice; if he gives no such evidence, it is the office of the judge to say that there is no question for the jury, and

(*f*) Bromage *v.* Prosser, 4 B. & C. 255. "Malice is essential to every action for libel. It has been sometimes divided into legal malice, or malice in law, and actual malice, or malice in fact. These terms might seem to imply that the two kinds of malice are different in their nature. The true distinction, however, is not in the malice itself, but simply in the evidence by which it is established. In all ordinary cases, if the charge or imputation complained of is injurious, and no justifiable motive for making it is apparent, malice is inferred from the falsity of the charge. The law in such cases does not impute malice not existing in fact, but presumes a malicious motive for making a charge which is both false and injurious when no other motive appears. Where, however, the circumstances show that the defendant may reasonably be supposed to have had a just and worthy motive for making the charge, then the law ceases to infer malice from the mere falsity of the charge, and requires from the plaintiff other proof of its existence. It is actual malice in either case; the proof only is different." Selden, J., in Lewis and Herrick *v.* Chapman, 16 N. Y. 372. See Jellison *v.* Goodwin, 43 Me. 287.

(*g*) Maule, J., Wenman *v.* Ash, 13 C. B. 845.

(*h*) Toogood *v.* Spyring 1 C. M. & R. 193. Somerville *v.* Hawkins, 10 C. B. 583. Croft *v.* Stevens, 7 H. & N. 570; 31 Law J., Exch. 143. Whiteley, *v.* Adams, 33 Law J., C. P. 94. Cowles *v.* Potts, 34 Law J., Q. B. 247. Moore *v.* Butler, 48 N. H. 161. Klinck *v.* Colby, 46 N. Y. 427, 433. Van Wyck *v.* Aspinwall, 17 N. Y. 190. White *v.* Nichols, 3 How. (U. S.) 266. Vanderzee *v.* McGregor, 12 Wend. 545. Howard *v.* Thompson, 21 Wend. 319.

to direct a nonsuit or a verdict for the defendant; otherwise there might be a question for the jury in every case where a master, however fairly, gives the character of a servant; and if they conceived that there was malice lurking in the mind of the master, they might give a verdict for the plaintiff on the ground merely of the communication having taken place; and this would apply to all cases in which the occasion has been said to repel the presumption of malice."(*i*). "A communication of this sort," observes Alderson, B., "is not strictly what is called a privileged communication, but it is rather a communication privileged by the occasion, and if it was made *bonâ fide* the particular expressions ought not to be too strictly scrutinized, provided the intention of the defendant was good(*j*).

Whether the circumstances under which a communication was made constitute it a privileged communication or not is a question which the court has assumed the jurisdiction of determining(*k*). But if there is any dispute about those circumstances, the question must be submitted to a jury. It is essential to the existence of the privilege and protection that the communication, under whatever circumstances made, should be believed to be true by the party making it; for a person cannot shelter himself under the privilege if he believes the charge imputed untrue, unless he at the same time declares his belief of its untruth. If a man knowingly makes a false charge, there is at once actual malice, and the privilege is blown to the winds(*kk*).

Where the auditors of a public company, employed in accordance with the provisions of the articles of association, made a report reflecting upon the conduct of the company's manager, and the directors

(*i*) Taylor *v.* Hawkins, 11 Q. B. 321. White *v.* Nichols, 3 How. (U. S.) 266.

(*j*) Woodward *v.* Lander, 6 C. & P. 550. See *post*, 936; Klinck *v.* Colby, 46 N. Y. 427, 435.

(*k*) Stace *v.* Griffith, L. R., 2 P. C. Ca. 420. As a general proposition it may be said that the question whether a publication is a privileged communication, is one for the jury. That is to say, the court may determine whether the subject matter to which the alleged libel relates, the interest in it of the defendant, or his relation to it, are such as to furnish the excuse. But the question of good faith, belief in the truth of the statement, and the existence of actual malice, remains; although the court should hold that, *prima facie*, the communication was privileged. And this question is one for the jury. Klinck *v.* Colby, 46 N. Y. 427. Cooper *v.* Stone, 24 Wend. 434. Brow *v.* Hathaway, 13 Allen, 239. See Moore *v.* Butler, 48 N. H. 161.

(*kk*) A newspaper publication which alleges mal-administration of public affairs is not libelous by reason of any *prima facie* libelous matter which it may contain if the publisher, believing upon reasonable grounds that the facts alleged were true, published them in good faith for the purpose of inducing a reform. But the rule is otherwise if the motive of the publisher was unjustifiable. Palmer *v.* Concord, 48 N. H. 211.

And a publication in a newspaper, which is defamatory in its character, cannot be deemed privileged simply because it relates to a subject of public interest, and was published in good faith, without malice, and from laudable motives, where the person injured by the defamatory article did not hold such a public office as to render him answerable to newspaper criticism, as in case of a trustee of a mining corporation. Wilson *v.* Fitch, 41 Cal. 363.

had the report printed and circulated among the shareholders, and it was used at an adjourned meeting, it was held that, the directors having done nothing contrary to the usual practice, the communication was privileged, and that, in the absence of express malice, no action lay against the directors for such publication(*l*). "Independently of any authority," says Mellor, J., "I am quite prepared to hold that a company having a great number of shareholders all interested in knowing how their officers conduct themselves, are justified in making a communication in a printed report relating to the conduct of their officers to all shareholders, whether present or absent, if the communication be made without malice, and *bonâ fide*." "I think," further observes Hannen, J., "that the failure of the directors to report to the shareholders a statement made by the auditors upon their own responsibility of what they found to be the state of the accounts, might have led the directors into a position of great difficulty."

1092 *Defamatory writings in courts of justice.*—An action for defamation will not lie for anything sworn or stated in the course of a judicial proceeding before a court of competent jurisdiction, such as defamatory bills or proceedings filed in Chancery or in the ecclesiastical courts, or

(*l*) Lawless *v.* Anglo-Egyptian Cotton Co., L. R., 4 Q. B. 262; 38 Law J., Q. B. 129. The report of the officers of a corporation to the stockholders of the result of their investigations into the conduct of their officers and agents, with their conclusions upon the evidence collected by them is a privileged communication, in the absence of malice or bad faith. But the privilege extends only to the making of the report and not to its publication in book form for distribution among the stockholders and in the community. Philadelphia, Wilmington and Baltimore R. R. Co. *v.* Quigley, 21 How. (U. S.) 202.

The report of a committee, appointed by the trustees of the College of Pharmacy of New York, for the purpose of investigating complaints in respect to the importation of spurious and adulterated drugs, was held to be a privileged communication, it having been made in good faith, upon probable cause, and with a laudable motive, although the report was in writing, was forwarded to the secretary of the treasury, and charged an examiner and inspector of drugs with gross violation of his official duty. Van Wyck *v.* Aspinwall, 17 N. Y. 190.

The publication of the true account of the proceedings of a medical society in the expulsion of a member for a cause within the jurisdiction of the society, is privileged. Barrows *v.* Bell, 7 Gray (Mass.), 301.

A paper drawn up on behalf of a number of merchants who have been defrauded of a large amount of goods by reason of false representations, in which they stated over their signatures that they had been robbed and swindled by certain parties therein named, and containing an agreement to bear equally the expenses of prosecuting the offenders criminally, is a privileged communication if made in good faith, and with probable cause; and the presentation of the paper to an agent of one of the parties defrauded, for the purpose of procuring the signature of the principal, is privileged. Klinck *v.* Colby, 46 N Y. 427.

To present a written charge against a member of a society to another member, for the purpose of obtaining his signature, is privileged.

And such a charge presented to a society having authority to receive and investigate it, is a privileged communication, if the charge is made in good faith, and the acts charged are violations of the rules of the society. Streety *v.* Wood, 15 Barb. 105.

Otherwise if the society have no right to act upon it. Fawcett *v.* Charles, 13 Wend. 473.

affidavits containing false and scandalous assertions against others(*m*). Therefore, if a man goes before justices of the peace and exhibits articles against the plaintiff containing divers false and scandalous charges concerning him, the plaintiff cannot have an action for a libel in respect of any matter contained in such articles, for the party preferring them "has pursued the ordinary course of justice in such a case; and if actions should be permitted in such cases, those who have just cause for complaint would not dare to complain, for fear of infinite vexation"(*n*). There is a large collection of cases where parties have from time to time attempted to get damages for slanderous and malicious charges contained in affidavits made in the course of a judicial proceeding, but in no one instance has the action been held to be maintainable(*o*); but the libeller may be punished, and the abuse repressed by a prosecution for perjury, the result of which is to make the libeller infamous if he is convicted(*p*).

Where the cause of action against a defendant was, that he falsely and maliciously, and without any reasonable or probable cause, went before a Commissioner for taking oaths in the Court of Chancery, and swore an affidavit, stating of the plaintiff, in his character of an auctioneer, that he conducted his business fraudulently and improperly, and that he was not, in the deponent's opinion, a fit and proper person to be intrusted with the sale of certain property then the subject of a suit in the Court of Chancery, and the court, upon the evidence before it, decided that the plaintiff was not a fit and proper person to conduct the sale, it was held that the affidavit, being made in the course of a judicial proceeding, could form no ground of action(*q*). But if the court has no jurisdiction in the matter, and no right to entertain the

(*m*) Ram *v.* Lamley, Hutt. 113. Weston *v.* Dobniet, Cro. Jac. 433. Astley *v.* Younge, 2 Burr. 809. Strauss *v.* Meyer, 48 Ill. 385. Lea *v.* White, 4 Sneed (Tenn.), 111. Garr *v.* Selden, 4 N. Y. 91. Sanford *v.* Bennett, 24 N. Y., 20; Laws of N. Y. 1854, ch. 130. Marsh *v.* Ellsworth, 50 N. Y. 309. Kidder *v.* Parkhurst, 3 Allen (Mass.), 393. Vansee *v.* Lee, 1 Hill (S. C.), 197. Hardin *v.* Armstock, 2 A. K. Marsh. 480. Hartsock *v.* Reddick, 6 Blackf. 255. Warner *v.* Paine, 2 Sandf. (N. Y.) 195.

While the law is well settled that a counsel or party conducting judicial proceedings is privileged in respect to words or writings used in the course of such proceedings reflecting injuriously upon others, when such words and writings are material and pertinent to the questions involved, irrespective of the motive with which they are used, it is equally well settled, in New York at least, that such privilege does not extend to matter having no materiality or pertinency to such questions. Marsh *v.* Ellsworth, 50 N. Y. 309. Gilbert *v.* People, 1 Denio, 41. Hastings *v.* Lusk, 22 Wend. 410. Ring *v.* Wheeler, 7 Cow. 725.

(*n*) Cutler *v.* Dixon, 4 Co. 14b.

(*o*) Henderson *v.* Broomhead, 4 H. & N. 579; 28 Law J., Exch. 360.

(*p*) As to a certificate from a military officer that his inferior officer left his quarters without permission, see Keighly *v.* Bell, 4 F. & F. 763.

(*q*) Revis *v.* Smith, 18 C. B. 126; 25 Law J., C. P. 195.

proceeding, and the charge is recklessly and maliciously made, it will not be regarded as a privileged communication(r).

1093 *Defamatory petitions to the Queen, to Parliament, or to ministers or officers of state respecting the conduct of magistrates and officers.*—As all persons have an interest in the pure administration of public justice, and as it is the duty of all persons who witness misconduct on the part of magistrates to try by all means in their power to bring such misconduct to the notice of those whose duty it is to inquire into and punish it, it has been held that petitions and memorials prepared *bona fide*, and forwarded to the proper authorities, complaining of the conduct of magistrates, and containing statements and allegations honestly believed to be true, are privileged communications; but if they are made on frivolous grounds, or with knowledge of their being untrue, or without knowledge of their truth or falsehood, and without inquiry, when inquiry would have made the truth apparent, and would have shown the allegation of misconduct false, the calumniator will be deemed to have acted from malicious motives, and his statements will not be privileged(s). Petitions to the Crown upon matters respecting which it cannot directly interfere, and petitions to Parliament, although the petitioners, besides presenting them to the House, print them and distribute them amongst the members, fall within the same rule. All these are protected, that men may not be prevented by the dread of a prosecution or action from making communications which may be beneficial to the public(t).

Defamatory statements respecting the conduct of public officers, contained in an application for the redress of a grievance, or to expose some public abuse, made *bonâ fide* to one of the king's ministers, who is supposed to have authority to afford redress, do not render the person making the application liable to an action. Thus, when the creditor of an officer in the army sent a petition to the secretary-at-war, inclosing bills of exchange accepted by the officer, and containing

(r) Buckley v. Wood, 4 Co. 14b. Lewis v. Levy, Ell. Bl. & Ell. 544; 27 Law J., Q. B. 282. See Perkins v. Mitchell, 31 Barb. 461; Milam v. Burnsides, 1 Brevard, 295; Hosmer v. Loveland, 19 Barb. 111.

(s) Harrison v. Bush, 5 Ell. & Bl. 354; 25 Law J., Q. B. 25. Sturt v. Blagg, 10 Q. B. 906. Thorn v. Blanchard, 5 Johns. 508. Gray v. Pentland, 2 S. & R. 23. But see Howard v. Thomson, 21 Wend. 319.

So of a petition to prevent the appointment of a candidate for office. Harris v. Harrington, 2 Tyler, 129. Hunt v. Bennett, 19 N. Y. 173.

Or a petition to withhold a tavern license from a person named therein. Vanderzee v. McGregor, 12 Wend. 545.

Or a communication from a church member to the proper church authorities concerning the character and conduct of his clergyman, and requesting his removal. O'Donaghue v. McGovern, 23 Wend. 56.

(t) Lake v. King, 1 Saund. 132.

statements derogatory to the character of the officer as a man of honor, and concluded with a prayer that the officer might be ordered to discharge the debts due on the bills, it was held, that although neither the secretary-at-war nor the king had power to order the money to be paid, yet that if the jury thought that the petition contained only an honest statement of facts, according to the understanding of the person who sent it, and that it was addressed to the secretary-at-war *bonâ fide* for the purpose of obtaining redress, and not for the purpose of slandering the plaintiff, they ought, under a plea of not guilty, to find a verdict for the defendant(*u*). "Inasmuch as the defendant," observes Maule, J., "might, reasonably enough, conceive that the public officer to whom he addressed himself had power to assist him in obtaining payment of a just debt, the occasion justified the communication, however mistaken the defendant might be as to the extent of the jurisdiction of the person to whom he was addressing himself"(*v*). But if the statements contained in the application be wholly or partly false, that may be sufficient to renew the presumption of malice, which *primâ facie* the nature of the communication would rebut(*x*). See *post*, p. 945.

1094 *Criminatory communications by public officers acting in discharge of a public duty.*—A criminatory communication made by a clerk of the peace to the justices at quarter sessions is privileged, provided it is confined to a statement of facts pertinent to a matter which it is his duty to investigate, and contains nothing but what the clerk of the peace believes to be true; but if he imputes improper motives to others, and accuses them of attempts to extort money by misrepresentation; if irrelevant calumny is introduced into it, or it contains strictures upon the motives and conduct of others, which the facts stated do not warrant, he will exceed his privilege, and subject himself to an action for damages(*y*). But no action will lie for statements made by a superior military or naval officer of his inferior in the course of his duty, even though made maliciously and without reasonable or probable cause(*z*).

1095 *Criminatory pastoral letters, and printed communications from clergymen to their parishioners.*—There is nothing in the position of a rector

(*u*) Fairman *v.* Ives, 5 B. & Ald. 644.
(*v*) Wenman *v.* Ash, 13 C. B. 845.
(*x*) Blagg *v.* Sturt, 10 Q. B. 905.
(*y*) Cooke *v.* Wildes, 5 Ell. & Bl. 340; 24 Law J., Q. B. 367. Popham *v.* Pickburn, 31 Law J., Exch. 133.
(*z*) Dawkins *v.* Lord Paulet, L. R., 5 Q. B. 94 (diss. Cockburn, C.J.). Quære, if the statements made be false to the knowledge of the officer making them. Ibid.

of a parish, or a vicar, curate, or any other minister of religion, which entitles him to publish or circulate defamatory letters in his parish, and such letters, though written and published under the gravest sense of duty, or the sincerest desire to improve the morals of the community, are actionable, if they cast serious imputations on the character or conduct of private persons. Where the schoolmaster of a national school, established in a parish of which the defendant was rector, had been dismissed by the trustees of the school from his situation, and had then obtained possession of a dissenting chapel, and opened a school there, it was held that the rector had no right to circulate letters in the parish, injuriously reflecting upon the conduct of the schoolmaster and the tendency of his teaching, under the pretext that he was watching over the souls of his parishioners, and exerting himself for their spiritual welfare. The parson in this case had, in a pastoral letter to divers parishioners, stigmatized the schoolmaster as not being a rightly-disposed Christian, as being imbued with a spirit of opposition to authority and the commands of Scripture, and designated his school as a schismatic school, upon which God's blessing could not rest; and he warned the rich against supporting it with subscriptions of money, and the poor against sending their children to it to be educated; and it was held that the libel was not privileged, and that there was evidence of malice for a jury. "What was there," observes Maule J., "in the position of the defendant, as rector of the parish, which entitled him to circulate a defamatory letter, not only in his own, but in the adjoining parish, and so endeavor to prevent persons from subscribing and sending their children to the plaintiff's school? It is difficult to understand how the slightest right to do so can be suggested. As rector he might, no doubt, visit and remonstrate with any of his flock; but when a meritorious individual is about to set up a school, of which he disapproves, because he thinks it may rival the school in which he takes an interest, that he should on that account cast serious imputations on that individual, and still be considered as having published a privileged communication, certainly seems a strange and inconvenient doctrine. We think that there was sufficient evidence for the jury to infer malice, and that in determining the question of malice, the particular nature of the libel itself cannot be excluded from the consideration of the jury. . . In this case the terms of the letter itself are not without the character of malice. The endeavor to make the plaintiff's conduct a matter of spiritual delinquency; to rep-

resent it as something opposed not only to some worldly rule, but unchristian-like, and contrary to what would be done by a person who had faith in, and a willingness to obey, scriptural precepts, are matters on the face of the libel which make it proper that the jury, looking at the libel itself, should say whether or not there was actual malice "(a).

1096 *Defamatory letters respecting clergymen*, addressed to the bishop of the diocese, will be privileged, if there was fair and reasonable cause for a resort to the bishop, but not if they were written on light and frivolous grounds. Where a parishioner wrote a letter to the bishop of the diocese, informing him of reports current in the parish derogatory to the character of the clergyman, and throwing scandal upon the Church, and praying that an inquiry might be instituted, it was left to the jury to determine whether the letter was written with the malicious intention of slandering the plaintiff to the bishop, and giving currency to idle rumors, or with the honest intention of obtaining an inquiry(b). If the writer of the letter has means at hand for ascertaining whether the rumors are true or false, and neglects to avail himself of them, and chooses to remain in ignorance when he might have obtained full information, there would be no pretence for any claim of privilege.

1097 *Privileged confidential communications between relations respecting the character of a person proposing marriage.*—Where the defendant, being the son-in-law of a widow lady, to whom the plaintiff was paying his addresses, wrote a letter to the lady charging the plaintiff with various acts of gross misconduct, and warned her against listening to his addresses, it was held that the communication was privileged. "If no explanation," observes Alderson, B., "had been given of the circumstances under which the letter was written, the law would, from the contents, infer it to have been published with a malicious motive against the plaintiff. But when it is shown that the parties were standing in circumstances of confidence and near relationship towards each other, I think the defendant's conduct justifiable, if he really believed in the truth of the statements which he made, though such statements were, in fact, erroneous, for it is for the common good of all, that communications between parties situated as these were should

(a) Gilpin v. Fowler, 9 Exch. 627; 23 Law J., Exch. 152. Words spoken or written in the regular course of church discipline, or to or of members of the church are privileged communications as among the members themselves, and only actionable on proof of express malice in the speaker or writer. But a charge so made by a member of the church against a person not a member, is not as to him a privileged communication. Coombs v. Rose, 9 Blackf. 155.

(b) James v. Boston, 2 C. & K. 8.

be free and unrestrained. The whole question is, whether this is a *bonâ fide* letter"(*c*).

1098 *Privileged confidential communications between friends to prevent an injury.*—If a confidential communication is honestly made between friends, purely to prevent an injury, and not for the purpose of slandering, the occasion justifies the act, and the communication is privileged(*d*). But no moral duty will justify the repetition and communication in writing of all the idle gossip a man hears to the prejudice of his neighbor. If a person is, under certain circumstances, under the pressure of a moral obligation to disclose the truth, he is, under all circumstances, under the pressure of a moral obligation to abstain from circulating and propagating falsehoods. No person, therefore, ought to hazard statements or assertions in writing injurious to the character of another, until he has by inquiry, where the means of inquiry exist, satisfied himself that they are founded in truth. The benefit to one man by the disclosure of the information, supposing it to be true, is counterbalanced by the injury done to another if it should turn out to be false.

Where the defendant had received a letter from his friend, the mate of a ship, containing a long narrative of dangers which the mate had incurred from the drunkenness of the captain, and asking for defendant's advice, and the defendant, honestly believing in the truth of his friend's statement, handed the letter to the shipowner, who dismissed the captain, and the latter sued the defendant for damages, the court were equally divided in opinion as to whether the communication was privileged or not; Tindal, C.J., and Erle, J., being of opinion that the occasion and circumstances under which the communication took place, and the purity of motive of the defendant in making it, rendered it a privileged and protected communication; while Cresswell, J., and Coltman, J., were of a contrary opinion. "It was not contended," observes Cresswell, J., "that any legal duty bound the defendant to communicate to the shipowner the contents of the letter he had received, nor was the communication made in the conduct of his own affairs, nor was his interest concerned. The authority for the publication, if any, must therefore be derived from some moral duty, public or private, which it was incumbent upon him

(*c*) Todd *v.* Hawkins, 2 M. & Rob. 21. It is no justification of libellous matter contained in a letter to a woman concerning her suitor, that the letter was written by her friend and former pastor at the request of her parents, who assented to all its contents. "Joannes" *v.* Bennett, 5 Allen (Mass.), 169.

(*d*) Holroyd, J., Fairman *v.* Ives, 5 B. & Ald. 645.

to discharge. I think it is impossible to say that the defendant was called upon by any public duty to make the communication; neither his own situation, nor that of any of the parties concerned, nor the interests at stake, were such as affect the public weal. Was there any private duty? There was no relation of principal and agent between the shipowner and the defendant; nor was any trust or confidence reposed by the former in the latter; there was no relationship or intimacy between them; no inquiries had been made; they were, until the time in question, strangers; and the duty, if it existed at all, as between them, must, therefore, have arisen from the mere circumstance of their being fellow-subjects of the realm. But the same relation existed between the plaintiff and the defendant. If the property of the shipowner on the one hand was at stake, the character of the captain was at stake on the other; and I cannot but think that the moral duty, not to publish defamatory matter which he did not know to be true, was quite as strong as the duty to communicate to the shipowner that which he believed to be true"(e). Here, however, the defendant had no means of ascertaining the truth or falsehood of the information, and the responsibility of acting upon it, without due inquiry, ought to rest with the shipowner. And if the defendant had been possessed of any personal interest in the subject-matter to which the letter related; if he had been a part owner of the ship, or an underwriter on the ship, or had any property on board, the communication of the latter to the shipowner would have fallen clearly within the rule relating to excusable publications; and so, if the danger disclosed by the latter either to the ship or the cargo, or the ship's company, had been so immediate as that the disclosure to the shipowner was necessary to avert such danger, then, upon the ground of social duty, by which every man is bound to his neighbor, the defendant would have been not only justified in making, but would have been bound to make, the disclosure(f).

1099 *Privileged communications by persons having a pecuniary interest involved in the matter of the communication.*—A communication made by a person immediately concerned in interest in the subject-matter to which it relates for the purpose of protecting his own interest, in the full belief that the communication is true, and without any malicious motive, is a privileged communication, and protected from lia-

(e) Cresswell, J., Coxhead v. Richards, 2 C. B. 605. Bennett v. Deacon, ib. 633. Bell v. Parke, 10 Ir. C. L. R. 284.

(f) Tindal, C.J., Coxhead v. Richards, 2 C. B. 596. Wilson v. Robinson, 7 Q. B. 68. Willes, J., Amann v. Damm, 8 C. B., N. S. 602.

bility in an action for libel. Where a letter was written confidentially to certain bankers, conveying charges injurious to the professional character of a solicitor in the management of certain concerns which they had intrusted to him, and it appeared that the writer of the letter was himself interested in the affairs which he supposed to be mismanaged, and wrote the letter *bonâ fide* under the impression that the statements were well founded, it was held that the communication was privileged. "If a communication of this sort," observes Lord Ellenborough, "which was not meant to go beyond those immediately interested in it, were the subject of an action for damages, it would be impossible for the affairs of mankind to be conducted"(*g*).

Among the various communications which have been held to be protected, in consideration of the private interest of the person making them, may be enumerated notices of the commission of an act of bankruptcy by the plaintiff, given by a creditor whose pecuniary interests required the information to be given(*h*), and communications respecting the character of servants (*post*, p. 943).

1100 *Reckless and inconsiderate communications.*—But it is not sufficient in

(*g*) M'Dougall *v.* Claridge, 1 Campb. 266. A written communication between private persons concerning their own affairs is *prima facie* privileged. And though all that is said is under mistake, yet the words are not for that reason alone actionable. Howard *v.* Thompson, 21 Wend. 319. P. W. & B. R. R. *v.* Quigley, 21 How. (U. S.) 202. Klinck *v.* Colby, 46 N. Y. 427. White *v.* Nicholls, 3 How. (U. S.) 266.

And where both the party making and the party receiving the communication have an interest in it, it has never been doubted that it was privileged. When, however, the interest is confined solely to the party receiving the communication, the authorities are not so decided. Lewis & Herrick *v.* Chapman, 16 N. Y. 369.

But it is well settled in New York, at least, that a communication is privileged when made in good faith, in answer to one having an interest in the information sought; and it is also privileged if volunteered when the party to whom the communication is made has an interest in it, and the party by whom it is made, stands in such relation to him as to make it a reasonable duty, or at least proper that he should give the information. Sunderlin *v.* Bradstreet, 46 N. Y. 188. Washburn *v.* Cook, 3 Denio, 110. Lewis *v.* Chapman, 16 N. Y. 369.

Thus where an agent is employed to procure information as to the solvency, credit and standing of another, and communicates, confidentially and in good faith to his principal, who has an interest in the subject matter, the information obtained, the communication is privileged. Washburn *v.* Cooke, 3 Denio, 110.

So, where one having an interest in knowing the credit and standing of another applies to a mercantile agency to obtain the desired information, the answer to such application will be a privileged communication. Ormsby *v.* Douglass, 37 N. Y. 477. So, if such agency volunteered the information to those only having dealings with the person to whom it relates by means of printed circulars, the communication might be deemed privileged. Commonwealth *v.* Stacey, 1 (Pa.) Leg. Gaz. Rep. 114. But when a mercantile agency, by means of circulars distributed generally among its subscribers, publishes a false statement of the pecuniary responsibility of a person, in whose standing only a portion of such subscribers have an interest, the publication will not be privileged, although made in full belief of its truth. Id. Sunderlin *v.* Bradstreet, 46 N. Y. 188. Taylor *v.* Church, 8 N. Y. 452. So, if such information is recorded in a book to which only the parties therein interested have access, the publication so made will be privileged; but otherwise if other parties had access to the book, although such parties stood in the relation of clerks. Beardsley *v.* Tappin, 5 Blatchf. C. C. 497.

(*h*) Blackham *v.* Pugh, 2 C. B. 611.

every case of a confidential communication made by a person having an interest in the subject-matter thereof, to show that it was made *bonâ fide* and without malice. A man has no right, as we have seen, to make himself the medium of propagating scandalous and defamatory accusations, unless he himself honestly believes them to be true, and his belief is not an honest belief, if it is formed in a reckless and inconsiderate manner. If he has the means by inquiry of ascertaining whether the charge is true or false, and neglects to make inquiry, and exercises no effort to arrive at the truth, his belief can hardly be said to be an honest belief; for whoever publishes and circulates in writing opinions and statements unfavorable to another, ought to be prepared to show that he had some reasonable ground for it. There is a wide distinction between reckless assertions made by a man who assumes to have a knowledge of the facts he communicates, and honest communications made with a view to inquiry and information by a person interested in knowing the truth(*i*). If a question is asked concerning the character of another, the person interrogated is not justified in giving a damaging answer, unless he has some fair and reasonable foundation for it.

1101 *Disclosures made bonâ fide in the course of an investigation set on foot by the plaintiff himself* are also privileged and protected. If, therefore, the plaintiff, or another person at the plaintiff's request, writes to the defendant asking for information on some point affecting the plaintiff's character, and the defendant merely relates *bonâ fide* what he has heard, the communication is privileged(*k*). Where the defendant, having given notice of dismissal to his footman and cook, they separately went to him and asked his reason for discharging them, when he told each, in the absence of the other, that (he or she) was discharged because both had been robbing him; whereupon each brought an action for the words so spoken to the other, it was held that the statement was privileged(*l*).

Answers to inquiries, therefore, made by persons interested in making the inquiry are privileged, if they are given *bonâ fide* in the discharge of any legal, moral, or social duty, as where the writer is, by his situation, bound to protect the interests of the inquirer, and they are believed to be true by the parties who give them. Thus, the answer to an inquiry addressed by a landlord to his tenant, respecting the character of a person proposing to be appointed game-keeper, or to

(*i*) James *v.* Boston, 2 Car. & K. 7.
(*k*) Hopwood *v* Thorn, 8 C. B. 316. Warr *v.* Jolly, 6 C. & P. 497.
(*l*) Manby *v.* Witt, 18 C. B. 544.

take a farm, is privileged by the occasion, if made *bonâ fide*(*m*). But if a person is supposed to have libelled or slandered another, and the party aggrieved asks him if he has done so, and he replies that he has, and repeats it, such a communication is not privileged(*n*); and per Wightman, J., "If the reports had originated elsewhere than with the defendant, and he had been merely called upon for information, and had given it, the case would have been different."

1102 *Communications between subscribers to charities.*—Words spoken by one subscriber to a charity in answer to inquiries by another subscriber, respecting the conduct of a medical man employed by the charity, in his attendance upon the objects of the charity, are not, merely on account of those circumstances, a privileged communication. "There may be a thousand subscribers to a charity," observes Lord Denman. "Such a claim of privilege is too large"(*o*).

1103 *Privileged communications respecting the character of servants.*—One of the most ordinary and common instances of the application in practice of the privilege of protection to confidential communications of a criminatory character, is that of a former master giving the character of a discharged servant, which, if given with honesty of purpose to a person who has any interest in the inquiry, is a privileged communication, although made in the presence and hearing of a stranger(*p*). Even though the statement be untrue in fact, the master will be held justified by the occasion in making the statement, unless it can be shown to have proceeded from a malicious mind. Malice may be established by various proofs: one may be that the statement is false to the knowledge of the person making it, and if there is any evidence of wilful untruth in the statements as to character, there is evidence of malice to be submitted to a jury. Generally speaking, anything said or written by a master when he gives the character of a servant is a privileged communication if made *bonâ fide* in answer to inquiries that have been addressed to him. It is not essential that the person making the communication should be put into action in consequence of a third party's putting questions to him. He may, when he thinks that another is about to take into his service one whom he knows ought not to be taken, set himself in motion to induce that other to seek information and put questions to him. The answers to such questions

(m) Cockayne v. Hodgkisson, 5 C. & P. 543. Sunderlin v. Bradstreet, 46 N. Y. 188. Washburn v. Cooke, 3 Denio, 110.
(n) Griffiths v. Lewis, 7 Q. B. 64.
(o) Martin v. Strong, 5 Ad. & E. 538.
(p) Toogood v. Spyring, 1 C. M. & R. 193. Weatherston v. Hawkins, 1 T. R. 110.

given *bonâ fide*, with the intention of communicating such facts as the other party ought to know, will, although they contain slanderous matter, come within the scope of a privileged communication. But in such a case it will be a question for the jury, whether the defendant has acted *bonâ fide*, intending honestly to discharge a duty, or whether he has acted maliciously, intending to do an injury to the servant. When he volunteers to give the character, stronger evidence that he acted *bonâ fide* will be required than in the case where he has given the character after being requested so to do(*q*).

If the employer has received credible information of the misconduct of a servant after the latter has left his situation, it is his duty to disclose the fact in answer to inquiries as to character, in order that a proper investigation may be made by the persons interested in knowing the truth(*r*). If a good character is given to a servant, and then circumstances are discovered which show that the character was not deserved, it is the duty of the person who has given the good character to communicate the discovery to the person to whom such character has been given, and the communication, if made *bonâ fide*, is privileged and protected(*s*). But if it appear from the terms and language of the communication and the surrounding circumstances of the case that there was any malicious or spiteful feeling actuating the master when making the communication, then it is not protected. If, therefore, it be proved that the bad character given of the servant is false, and that the master knew it at the time he gave it, there is evidence of express malice, and the privilege is annihilated. If the master characterizes his servant as a "bad-tempered, lazy, impertinent fellow," and the servant brings forward persons with whom he has previously lived who give him a good character, and contradict the allegation of his bad temper, laziness, and impertinence, it is incumbent on the master to give some general evidence, showing that he had a reasonable ground for using the language he did use, and that the statement was not totally unfounded and wholly devoid of truth. If he fails to give some general evidence of this sort, the charge against the servant will be considered reckless and unfounded, and there will be evidence of malice for a jury(*t*).

Where a libel imputed to the plaintiff incompetency and unskilful-

(*q*) Pattison *v.* Jones, 8 B. & C. 578. See Freyer *v.* Kinnersly, 33 Law J., C. P. 97.
(*r*) Child *v.* Affleck, 9 B. & C. 403.
(*s*) Gardner *v.* Slade, 13 Q. B. 801. Fowles *v.* Bowen, 30 N. Y. 20.
(*t*) Rogers *v.* Clifton, 3 B. & P. 591. Acc. in the case of a governess, Fountain *v.* Boodle, 3 Q. B. 11.

ness in a particular transaction in which the plaintiff had been employed by the defendant, it was held that it was not competent to the plaintiff to give evidence of general competency and skilfulness, without meeting the specific instance relied upon by the defendant(*u*).

Where the plaintiff, being secretary of an association called the Brewers' Company, was dismissed for alleged misconduct, and the defendant, who was a director of the company, and also a director of another company, called the London Necropolis Company, of which the plaintiff was auditor, called the attention of the directors of the last-named company to the plaintiff's misconduct and dismissal from the secretaryship of the other company, alleging that he had been charged with obtaining money from the solicitors of the company by false pretences, and taking up a bill of his own with it, it was held that the defendant might properly, in his character of director of the Necropolis Company, make the communication he did, although it charged the plaintiff with the actual commission of the offence imputed to him, or amounted to an assertion on the defendant's part that he believed the charges to be true; for it was both his duty and interest to make the communication; and it was held that, in order to render the defendant liable in damages, actual malice must be shown, in the shape of proof that the defendant was not actuated by a justifiable motive, but by some evil intention towards the plaintiff(*x*).

1104 *Comments in excess of the privilege.*—"The proper meaning of a privileged communication," observes Parke, B., "is only this, that the occasion on which the communication was made rebuts the inference of malice, *primâ facie* arising from a statement prejudicial to the character of the plaintiff, and puts it on him to prove that there was malice in fact, *i.e.*, that the defendant was actuated by motives of personal spite or ill-will, independent of the occasion on which the communication was made"(*y*). This may be established by the language of the communication itself, by showing that it was made in virulent and abusive terms, and that the words used were stronger than the occasion justified(*z*). When the communication is in writing, the jury are entitled to look at and read the writing, in order to judge of its true character.

(*u*) Brine *v.* Bazalgette, 3 Exch. 692.

(*x*) Harris *v.* Thompson, 13 C. B. 343. See Lawless *v.* Anglo-Egyptian Co., *ante*, p. 933. As to how far a printed caution to the public against the acts of a former servant or employee is privileged, see Hatch *v.* Lane, 105 Mass. 394; Gassett *v.* Gilbert, 6 Gray (Mass.), 94.

(*y*) Wright *v.* Woodgate, 2 Cr. M. & R. 577. Klinck *v.* Colby, 46 N. Y. 427, 433. Lewis *v.* Chapman, 16 N. Y. 369, 378.

(*z*) Brown *v.* Croome, 2 Stark. 297. Godson *v.* Horne, 1 B. & B. 7. Blagg *v.* Sturt, *ante*, p. 936.

"Any one, in the transaction of business with another, has a right to use language, *bonâ fide*, which is relevant to that business, and which a due regard to his own interest makes necessary, even if it should directly, or by its consequences, be injurious or painful to another; but he has no right to make defamatory comments on the motives or conduct of the party with whom he is dealing." Where, therefore, the defendant claimed a sum of money from the plaintiff, and the plaintiff's clerk wrote, by direction of the plaintiff, to the defendant, telling him that the plaintiff denied his liability, whereupon the defendant wrote to the clerk, alleging facts in support of his claim, and added, "this attempt to defraud me is as mean as it is dishonest," it was held that the comment was not privileged, and was libellous and actionable(*a*).

1105 *Of the effect of addressing privileged communications to a wrong party by mistake.*—It does not appear to have been expressly decided, whether an honest mistake, made in sending a privileged communication to the wrong person, destroys the privilege, and subjects the party making the communication to an action; or how it would be if a gentleman, asked by letter for the character of a servant, should, *bonâ fide*, write an answer, stating acts of dishonesty and immorality committed by the servant, and, by mistake, address the letter to another person, different from the inquirer, although of the same name(*b*).

1106 *Reports of trials containing defamatory matter.*—"Newspapers and other publications," observes Tindal, C.J., "which narrate what passes in courts of justice, are, to a certain extent, privileged. No one can read their accounts of judicial proceedings without being sensible that, on several occasions, they do, to a certain extent, serve the cause of public justice. They ought therefore to be privileged, but their privilege must be restrained to occasions in which they publish fairly what passes in court. Everybody knows that the statement of counsel is *ex parte*, and that he is often instructed to make allegations which it is afterwards impossible to support in proof. If, therefore, after a cause has been tried, a defamatory statement by counsel, which the evidence has not at all supported, is published in a newspaper, the publication is not privileged, because it is not a fair account of what passed in court"(*c*). The cases in which reports of legal proceedings,

(*a*) Touson *v.* Evans, 12 Ad. & E. 733. Klinck *v.* Colby, 46 N. Y. 427, 434. Hastings *v.* Lusk, 22 Wend. 410, 415, 416.

(*b*) Harrison *v.* Bush, 5 Ell. & Bl. 350.

(*c*) Saunders *v.* Mills, 6 Bing. 213. Hoare *v.* Silverlock, 9 C. B. 20; 19 Law J., C. P. 215. Beauchamps (Ld.) *v.* Croft, Dyer, 285a. Curry *v.* Walter, 1 B. & P. 525. Lewis *v.* Walter, 4

whether *ex parte* or not, have been held to be libellous and actionable are, where the account published has been false or highly colored, or where the reporter has added comments, allegations, and opinions of his own, reflecting upon the character or conduct of others(*d*), or where the matters given in evidence and published are of a grossly scandalous, blasphemous, or immoral character(*e*).

1107 *Publications of ex parte statements and of proceedings preliminary to a trial.*—"We are not prepared," observes Lord Campbell, "to lay down for law, that the publication of preliminary inquiries before magistrates is universally lawful, nor that the publication of such inquiries is universally unlawful. One of the resolutions of this court, in Duncan v. Thwaites(*f*), lays down the doctrine that the report of a preliminary examination before a magistrate is unlawful, where the party accused has been committed or held to bail for an indictable offence; there the actual pendency of a prosecution was a main ingredient in the decision; but where the party accused has neither been committed nor held to bail, but absolved by the magistrate, we think we are at liberty to hold that an impartial and correct report of the proceedings is lawful. In the cases relied upon to establish the general doctrine that reports of preliminary proceedings before magistrates are not lawful, it will be seen that there were either vituperative comments accompanying the statement of the evidence, or some aggravation attending the publication of the report, or some peril which was likely to be caused to the person complaining of it"(*g*).

The privilege is not confined to the publication of the proceedings of the superior courts. The dignity of the court cannot be regarded, and "no distinction can be made for this purpose between a court of *pie poudre* and the House of Lords."

A magistrate, upon any preliminary inquiry respecting an indictable offence, may, if he thinks fit, carry on the inquiry in private, and the publication of any such proceedings before him would undoubtedly be unlawful; but while he continues to sit *foribus apertis*, admitting

B. & Ald. 614. A full, fair, and correct account of a trial in a court of justice is a privileged communication, so far as the account contains nothing but what forms strictly and properly the actual legal proceedings. Stanley v. Webb, 4 Sandf. (N. Y.) 21.

(*d*) Stiles v. Nokes, 7 East, 492. Lewis v. Clement, 3 B. & Ald. 710. Andrews v. Chapman, 3 C. & K. 286.

(*e*) Rex v. Carlile, 3 B. & Ald. 169. See Steele v. Brannan, L. R., 7 C. P. 261.

(*f*) 3 B. & C. 556.

(*g*) Ld. Campbell, C.J., in Lewis v. Levy, Ell. Bl. & Ell. 557; 27 Law J., Q. B. 289. The publication of *ex parte* preliminary proceedings before a magistrate is not privileged, and the publisher must find his justification, not in the privilege but in the truth of the publication. Stanley v. Webb, 4 Sandf. (N. Y.) 21. Matthews v. Beach, 5 ib. 256.

into the room where he sits as many of the public as can be conveniently accommodated, and thinking that this course is best calculated for the investigation of truth and the satisfactory administration of justice (as in most cases it certainly will be), the court in which he sits is to be considered a public court of justice, provided the magistrate has jurisdiction over the matters brought before him, and authority to inquire into them. But "if magistrates publicly hear slanderous complaints respecting matters over which they have no jurisdiction, a report of what passes before them is as little privileged as if they were illiterate mechanics assembled in an ale-house "(*h*).

1108 *Publication of speeches and proceedings in Parliament.*—Information printed merely for the use of members of Parliament and circulated amongst them is privileged; but writings containing defamatory matter, though printed for the use of members, cannot lawfully be circulated amongst those who are not members of Parliament(*i*). However, the 3 & 4 Vict. c. 9, enacts, that a defendant in any civil or criminal proceeding brought for the publication of any report, paper, vote, or proceeding published under the authority of either House of Parliament, may, on the production of a certificate from the speaker of either House, duly verified, stating that such report, paper, etc., was published by the authority of the House, apply to the court, or judge of the court in which the proceedings are pending, and have them stayed. By the 2nd section it is provided, that any suit or criminal proceeding for the publication of a copy of such authorized report, paper, etc., may be stayed on the production of the original report, paper, etc., and of an affidavit verifying the correctness of the copy. And by the 3rd section it is enacted that in any civil or criminal proceeding for the publication of any extract or abstract of such report, paper, etc., the defendant may give evidence under the general issue that the extract or abstract was published *bonâ fide* and without malice, and, on the jury being satisfied of that, shall be entitled to a verdict.

A member of Parliament may make what reflections he pleases upon the character of others from his place in the House of Commons, but if he prints and publishes his speeches (except, perhaps, *bonâ fide* for the information of his constituents(*k*), he will be responsible in damages

(*h*) 27 Law J., Q. B. 288. M'Gregor v. Thwaites, 3 B. & C. 24.

(*i*) Stockdale v. Hansard, 9 Ad. & E. 1. It is not libellous to publish the testimony of witnesses taken before an investigating committee in Congress. Terry v. Fellows, 21 La. An. 375.

(*k*) See Wason v. Walter, L. R., 4 Q. B. 93.

if they are of a libellous character(*l*). However, a faithful report by a public newspaper of an entire debate in either House of Parliament, containing matter disparaging to the character of an individual, as having been spoken in the course of the debate, is not actionable at the suit of the party whose character is thus called in question; but the publication is privileged on the same principle as an accurate report of proceedings in a court of justice is privileged, *viz.*, that the advantage of publicity to the community at large outweighs any private injury resulting to the indiviual from the publication(*m*).

1109 *Defamatory reports of proceedings at public meetings, vestry meetings, etc.*—The principle which protects newspaper proprietors and others, who publish a fair and correct statement of what takes place in courts of justice, does not extend to protect the publication of reports, speeches, and proceedings at vestries and public meetings, or meetings of commissioners appointed to be holden by statute for public purposes. "At such meetings," observes Lord Campbell, "things may be said very relevant to the subject in hand, but very calumnious; and in what an unhappy situation the calumniated person would be, if the calumny might be published, and yet he could not bring an action and challenge the printer and publisher of the libel to prove its truth(*n*).

1110 *Reviews and criticisms in public papers.*—"Every man," observes Lord Ellenborough, "who publishes a book, commits himself to the judgment of the public, and any one may comment upon his performance. If the commentator does not step aside from the work, or introduce fiction for the purpose of condemnation, he exercises a fair and legitimate right; but if he follows the author into domestic life for the purpose of slander, that will be libellous. Authors are liable to criticism, to exposure, and even to ridicule, if their compositions are ridiculous, otherwise the first who writes a book upon any subject will maintain a monopoly of sentiment and of opinion respecting it, which would tend to the perpetuity of error." "The critic does a great service to the public who writes down any vapid or useless publication, such as ought never to have appeared. He checks the dissemination of bad taste, and prevents people from wasting both their time and their money upon trash. I speak of fair and candid criticism, and this every one

(*l*) Rex v. Creevey, 1 M. & S. 280. Rex v. Ld. Adingdon, 1 Esp. 226; cited 26 Law J., Q. B. 170; 7 Ell. & Bl. 233.

(*m*) Wason v. Walter, L. R., 4 Q. B. 73.

(*n*) Davison v. Duncan, 7 Ell. & Bl. 231; 26 Law J., Q. B. 106; 7 H. & N. 89. Popham v. Pickburn, 31 Law J., Exch. 133. See Cox v. Feeney, 4 F. & F. 13. See Holt v. Parsons, 23 Texas, 9.

has a right to publish, although the author may suffer a loss from it. Such a loss the law does not consider an injury, because it is a loss which the party ought to sustain. It is the loss of fame and profit to which he was never entitled "(*o*).

"The editor of a public newspaper," observes Lord Kenyon, "may fairly and candidly comment on any place or species of public entertainment, but it must be done without malice or view to injure or prejudice the proprietor in the eyes of the public. If fairly done, however severe the censure, the justice of it screens the editor from legal animadversion; but if it can be proved that the comment is malevolent, and exceed the bounds of fair opinion, then it is a libel and actionable "(*p*). And the same rule applies to an article in a newspaper upon a debate in either House of Parliament upon a subject of public interest. It must be honest, and fair, *i.e.*, the writer must believe it to be true or just, and it must be made with a reasonable degree of judgment and moderation(*q*).

1111 *Criticisms by one public journalist upon another.*—It is competent to one public writer to criticise another and ridicule his sentiments and opinions, but he is not justified in making calumnious remarks on the private character of the individual, or in imputing to him sordid and dishonest motives, or base and dishonorable conduct. In that respect, the editor of a newspaper enjoys a right of protection in common with every other subject(*r*). A paragraph in one newspaper charging another with being a vulgar, ignorant, and scurrilous journal, is not actionable; but it is otherwise if it asserts that it is in low circulation, and calls the attention of advertisers to the fact, as the plain object of it is to damage the sale of the paper, and diminish the profits from advertising(*s*).

Works of art are as much the subjects of criticism as the writings of an author. "Any man has a right," observes Lord Tenterden, "to express his opinion of them; and however mistaken, in point of taste, that opinion may be, or however unfavorable to the merits of the author or artist, the person entertaining it is not precluded by law from its

(*o*) Carr *v.* Hood, cited in Tabart *v.* Tipper, 1 Campb. 357.

(*p*) Dibdin *v.* Swan, 1 Esp. 28. See Fry *v.* Bennett, 3 Bosw. (N. Y.) 200. A newspaper proprietor is not privileged as such in the dissemination of news, but is liable for what he publishes in the same manner as any other individual. Sheckells *v.* Johnson, 10 Cush. 25. Snyder *v.* Fulton, 34 Md. 128, and see Wilson *v.* Fitch, 41 Cal. 363; Palmer *v.* Concord, 48 N. H. 161.

(*q*) Wason *v.* Walter, *ante*, p. 949.

(*r*) Ld. Ellenborough, Stuart *v.* Lovell, 2 Stark. 97. Campbell *v.* Spottiswoode, 32 Law J., Q. B. 185.

(*s*) Heriot *v.* Stuart, 1 Esp. 436.

fair, reasonable, and temperate expression, although through the medium of ridicule. If it is unfair and intemperate, and written for the purpose of injuring the artist in his profession, it is actionable"(*t*).

1112 *Criticisms upon handbills and advertisements.*—If a man circulates a printed handbill, or posts it up in a public thoroughfare, or advertises in the public papers, the handbill, or the advertisement, is as much open to fair and candid comment and criticism as any published book or pamphlet. But those who criticise it must not go out of their way to impute motives, and make reflections upon private character not fairly warranted by the terms and tendency of the writing or advertisement(*u*).

1113 *Criticisms upon sermons and clergymen.*—The law permits comments to be made upon the sermons delivered by clergymen from their pulpits, provided the comments are fairly, justly, and truly made. A clergyman also may be fairly characterized as a remarkably bad preacher, or as a preacher of erroneous doctrines, and if the parson sustains an injury from the criticism, it is an injury for which there is no redress at law by damages. But the preaching of a sermon in the ordinary mode of a clergyman's duty in the parish church does not make the sermon public property, so as to invite observation upon it, and authorize the same freedom of criticism and comment from the press in general, as is extended to the publication of a literary work(*x*). And all reflections upon the private character or conduct of the clergyman, calculated to bring him into disrepute with his parishioners, are libellous and actionable. However, what he does in the vestry-room, and allows to be done in the church during Divine service, is a matter of public interest, and therefore any comments upon it, unless stronger language is used than the occasion justifies (which is a question for the jury), are not actionable(*y*).

1114 *Comments upon the public character of public men.*—There is a wide difference between publications relating to public and private individuals. Every person has a right to comment upon those acts of public men which concern him as a subject of the realm, if he do not make his commentary a vehicle for malice and the indulgence of some private spite or pique. "You have a right to comment on the public acts of a minister, upon the public acts of a general, upon the public

(*t*) Soane *v.* Knight, M. & M. 74.
(*u*) Paris *v.* Levy, 30 Law J., C. P. 11.
(*x*) Gathercole *v.* Miall, 15 M. & W. 344. Hearne *v.* Stowell, 12 Ad. & E. 719.
(*y*) Kelley *v.* Tinling, L. R., 1 Q. B. 699.

judgments of a judge, upon the public skill of an actor, but you have no right to impute to them such conduct as disgraces and dishonors them in private life"(*z*).

1115 *Disparaging criticisms by one tradesman upon the goods of a rival tradesman* are not actionable, unless it be proved that they have been maliciously and fraudently made, and were false to the knowledge of the party at the time they were made Thus, where a mineral oil merchant got a chymist to test the quality of a mineral oil he had imported, and to compare it with the oil sold by a rival oil-merchant, and then printed and circulated the chymist's report, which spoke disparagingly of the plaintiff's oil in comparison with the oil of the defendant, it was held that this report was no libel upon the plaintiff if it was the result of a *bonâ fide* examination and comparison of the two oils, and contained nothing that was false to the knowledge of the defendant at the time he published and circulated it(*a*). But where a gunsmith published an advertisement in a newspaper of his being the inventor of a short gun which shot as far as other longer guns, and another gunsmith inserted a counter advertisement cautioning persons against these guns, and stating that the inventor durst not engage with any artist in town, and had made no such experiment, etc., it was held that this was a libel, for though any one in the trade might contradict the fact asserted respecting the short gun, no one had a right to indulge in any general reflections upon the character of the inventor and his conduct of his business; that the advice to all persons to be cautious was a reflection on the inventor's honesty as leading people

(*z*) Parmiter *v.* Coupland, 6 M. & W. 108. A person consenting to become a candidate for a public office at a public election puts his character at issue so far as relates to his fitness and qualifications for the office; and the publication of the truth on this subject with the honest intention of giving information to the public will not be libel. But the rule is otherwise where the publication contains only falsehood and calumny. Commonwealth *v.* Odell, 3 Pittsb. (Pa.) 449. Officers and candidates for office may be canvassed but not calumniated. Seeley *v.* Blair, Wright, 358, 683.

Libellous matter published in a newspaper in regard to a candidate for a public office is not privileged. Aldrich *v.* Press Printing Co., 9 Min. 133. At least where the office is not within the gift of the people but is the subject of appointment. Hunt *v.* Bennett, 19 N. Y. 173.

A publication which assails the integrity and capacity of a judge is actionable. Robbins *v.* Treadway, 2 J. J. Marsh. 540. See Lansing *v.* Carpenter, 9 Wis. 540; Van Tassel *v.* Capron, 1 Denio, 250; Matter of Moore, 63 N. C. 397. But to charge a judge of corrupt conduct in the trial of a cause over which he had no jurisdiction is not actionable. Oraam *v.* Franklin, 5 Blackf. 42.

(*a*) Young *v.* Macrae, 32 Law J., Q. B. 6. A coal merchant who had advertised genuine Franklin coal for sale published the following advertisement: "Caution. The subscribers, the only shippers of the true and original Franklin coal, notice that other coal-dealers in L. than our agent J. S., advertise Franklin coal. We take this method of cautioning the public against buying of other parties than J. S., if they hope to get the genuine article, as we have neither sold nor shipped any Franklin coal to any party in L. except our agent J. S." Held not libellous. Boynton *v.* Remington, 3 Allen (Mass.), 397.

to suppose that he would deceive them, and the allegation that he would not engage with any other artist was setting him below the rest of his trade(*b*).

SECTION II.

OF VERBAL SLANDER.

1116 *When defamatory words are actionable.*—The old cases respecting the liability of persons for the utterance of verbal slander are of the most unsatisfactory and contradictory character. "They are," observes Pratt, C.J., "very odd cases"(*c*). At one period the courts seem to have regarded actions for slander, by word of mouth, with great disfavor, and to have done all they could to discourage them; at another time they favored the action, because men's tongues were growing more and more virulent and dangerous, and people were apt to take the law into their own hands, and revenge themselves on the slanderer if they failed to obtain redress in a court of justice(*d*). In some cases we find judges complaining of the growth of actions for verbal slander, saying that they would spoil all communications between man and man, and repress all expression of opinion, so that one would be afraid to speak disparagingly of the accommodation afforded by a particular inn, or of the wine sold therein, or of the surveys furnished by a particular surveyor(*e*). At another period we find judges lamenting the frequency of scandals and the license given to the tongue of the slanderer, and expressing their surprise that cases are to be found in the books in which a clergyman failed to obtain compensation in damages for an imputation of adultery(*f*), and that a schoolmistress had been declared incompetent to maintain an action for verbal charges of prostitution(*g*).

"The opinions of later times," observes Holt, C.J., "have been in many instances different from those of former days in relation to actions for words, and judgments have gone different ways; . . . but

(*b*) Harman *v.* Delaney, 1 Barnard, 289; 2 Str. 898.
(*c*) Button *v.* Heyward, 8 Mod. 24.
(*d*) Harrison *v.* Thornborough, 10 Mod. 198.
(*e*) King *v.* Lake, 2 Ventr. 28. Crofts *v.* Brown, 3 Bulstr. 157.
(*f*) Parrot *v.* Carpenter, Cro. Eliz. 502; Noy, 64.
(*g*) Per Twisden, J., Wharton *v.* Brook, 1 Ventr. 21. Wilby *v.* Elston, 8 C. B. 142. Ld. Denman, C.J., Ayre *v.* Craven, 2 Ad. & E. 7.

for my part, wherever words tend to take away a man's reputation, I will encourage such actions, because so doing will contribute much to the preservation of the peace"(*gg*).

1117 *Defamatory words not actionable without special damage.*—As the law at present stands, mere vituperation and abuse by word of mouth, however gross, is not actionable, unless it is spoken of a professional man or tradesman in the conduct of his profession or business(*h*). Thus, to call a man a scoundrel, or blackguard, or a swindler(*hh*), or a rogue(*i*), or to say of a man, "You are a fellow, a disgrace to the town, and unfit for decent society, on account of your conduct with whores," is not actionable(*ii*). Neither is it actionable to call a man a blackleg, unless it be shown that by the use of the term the defendant intended to impute to the plaintiff that he is a cheating gambler(*k*); nor to say of a young lady that she is a notorious liar, an infamous wretch, and has been all but seduced by a notorious libertine(*l*). Words imputing to a lady that she gets her living by imposture and prostitution, and that she is a swindler, are not actionable without special damage(*m*); nor the words, "He is a rogue, and has robbed and cheated his brother-in-law of upwards of 2000*l*."(*n*).

(*gg*) Baker *v.* Pierce, 6 Mod. 24. Fortescue, J., Button *v.* Heyward, 8 Mod. 24.

(*h*) This rule of the common law has been changed by statute in Mississippi. See Davis *v.* Farrington, Walker, 304.

(*hh*) Chase *v.* Whitlock, 3 Hill, 139. Odiorne *v.* Keyser, 2 Foster (N. H.), 323.

(*i*) Idoi *v.* Jones, 2 Dev. 162. Artieta *v.* Artieta, 15 La. An. 48. Ford *v.* Johnson, 21 Ga. 399. Oakley *v.* Farrington, 1 Johns. Cas. 129. Caldwell *v.* Abby, Hardin, 529.

(*ii*) Lumby *v.* Allday, 1 Cr. & Jerv. 301. Savile *v.* Jardine, 2 H. Bl. 531. It is not actionable to call another a cheat. Odiorne *v.* Bacon, 6 Cush. 185. Unless the term is used in relation to such person's business. Id. It has been held actionable to call an attorney a cheat. Rush *v.* Cavenaugh, 2 Barr. 187.

It is not actionable to call another a liar. Smalley *v.* Anderson, 4 Monroe, 367. And it is not actionable *per se* to charge another with the intemperate use of spirituous liquors. O'Hanlon *v.* Myres, 10 Rich. Law (S. C.), 128. To charge one with drunkenness on a certain day is not actionable. Warren *v.* Norman, Walker, 337. Nor is it actionable to charge another with drunkenness generally. Buck *v.* Hersey, 31 Me. 558. But it has been held actionable to charge a woman with drunkenness. Brown *v.* Nickerson 5 Gray (Mass.), 1. Or a preacher. M'Millan *v.* Birch, 1 Birm. 178.

In South Carolina it is actionable to call a man or his wife a mulatto. Eden *v.* Legare, 1 Bay, 177. Atkinson *v.* Hartley, 1 M'Cord, 203. King *v.* Wood, 1 N. & M. 184. But see Barret *v.* Jarvis, 1 Ham. 83, n. Calling another a knave has been held actionable. Harding *v.* Brooks, 5 Pick. 244. And to call another a vagrant has been held slanderous. Miles *v.* Oldfield, 4 Yeates, 423.

(*k*) Barnett *v.* Allen, 3 H. & N. 376; 27 Law J., Exch. 412. Van Tassel *v.* Capron, 1 Denio, 250.

(*l*) Lynch *v.* Knight, 9 H. of L. Ca. 577. But see Malone *v.* Stewart, 15 Ohio, 319.

(*m*) Wilby *v.* Elston, 8 C. B. 142. In many of the States of the Union, statutes have been passed declaring that words spoken of and concerning a female imputing to her a want of chastity are actionable *per se*; and in Connecticut, at least, it has been held that such was always the rule in that State at common law. In a few States the old common law rule remains unchanged.

(*n*) Hopwood *v.* Thorn, ib. 313. See Filber *v.* Dantermann, 28 Wis. 134; Wöll *v.* Schmidt, 28 Wis. 138; McCarty *v.* Barrett, 12 Minn. 494.

1118 *Defamatory words actionable per se without proof of any special damage.*—But words imputing an indictable offence are actionable *per se* without proof of any special damage, as they render the accused person liable to the pains and penalties of the criminal law(*nn*). Such are words imputing felony, bigamy(*o*), forgery, the receipt of stolen goods, knowing them to be stolen(*p*); the careless or unskilful administration of mercury, or any other poisonous or dangerous drug, and thereby causing death(*q*); the keeping of a bawdy-house(*r*), or the

(*nn*) In order to render words actionable *per se*, on the ground that they impute criminality to the plaintiff, they must, first, be such as charge him with an indictable offence; and, second, the offence charged must involve a high degree of moral turpitude, or subject the offender to infamous punishment. Hollingsworth *v.* Shaw, 19 Ohio St. 430. Young *v.* Miller, 3 Hill (N. Y.), 22. Quinn *v.* O'Gara, 2 E. D. Smith (N. Y. C. P.), 388. McNamara *v.* Shannon, 8 Bush (Ky.), 557. Hoag *v* Hatch, 23 Conn. 585. Wright *v.* Paige, 36 Barb. 438. Smith *v.* Smith. 2 Sneed (Tenn.), 473. Brooker *v.* Coffin, 5 Johns. 188. Perdue *v.* Burnett, Minor, 138.

Words imputing a crime for which a party is liable to be imprisoned are not actionable *per se* unless the crime is one implying moral turpitude. Redway *v.* Gray, 31 Vt. 292.

Thus to charge a person with burning his own buildings with intent to defraud an insurance company which has insured them, is not in Vermont actionable *per se*. Redway *v.* Gray, 31 Vt 292.

Words which impute an offence which may be punishable by death, may not be actionable *per se*; if such offence is one cognizable only by a court in which indictments and trial by jury are unknown. Thus to charge a person with being a deserter is not actionable *per se*, the offence charged being one cognizable by a court martial only. Hollingsworth *v.* Shaw, 19 Ohio St. 430.

To call another a bushwhacker. Curry *v.* Collins, 37 Mo. 324. A free negro. McDowell *v.* Bowles, 8 Jones, L. (N. C.) 184. A swindler. Chase *v.* Whitlock, 3 Hill, 139. Or words of similar character or import are not actionable *per se*.

(*o*) Heming *v.* Power, 10 M. & W. 570. Parker *v.* Meader, 32 Vt. 30. Wiley *v.* Campbell, 5 Monr. 396.

(*p*) Alfred *v.* Farlow, 8 Q. B. 854. Atkinson *v.* Reding, 5 Blackf. 39. Thorn *v.* Moser, 1 Denio, 448.

(*q*) Edsall *v.* Russel, 5 Sc. N. R. 801. Secor *v.* Harris, 18 Barb. 425. Johnson *v.* Robertson, 8 Port. 486.

(*r*) Brayne *v.* Cooper, 5 M. & W. 250. Wright *v.* Paige, 36 Barb. 438. Words spoken of another imputing guilt of the crime of perjury are actionable *per se*. Jacobs *v.* Fyler, 3 Hill, 572. Magee *v.* Stark, 1 Humph. 506. Spooner *v.* Keeler, 51 N. Y. 527. Crone *v.* Angel, 14 Mich. 340. Newbit *v.* Statuck, 35 Me. 315. Sanford *v.* Gaddis, 13 Ill. 329. Eccles *v.* Shannon, 4 Harring. 193. If they relate to some matter which would render the person spoken of liable to be indicted for perjury. Wilson *v.* Oliphant, Wright, 153. Dalton *v.* Higgins, 34 Ga. 433. Bonner *v.* McPhail, 31 Barb. 106. Jones *v.* Marrs, 11 Humph. 410. Beswick *v.* Chappel, 8 B. Monr. 486. But it is not actionable *per se* to charge another with swearing falsely since, if the oath be not taken in a judicial proceeding, the act charged does not amount to perjury. Kimmis *v.* Stiles, 44 Vt. 351. Shinloub *v.* Ammerman, 7 Ind. 347. Mebane *v.* Sellars, 3 Jones' Law (N. C.), 199. Phincle *v.* Vaughn, 12 Barb. 215. Barger *v.* Barger, 18 Penn. St. 486. But see Carlock *v.* Spencer, 2 Eng. 12; Crawford *v.* Mellton, 12 S. & M. 328.

To charge another of removing a land-mark. Young *v.* Miller, 3 Hill, 21. Dial *v.* Holler, 6 Ohio (N. S.), 228.

Or burning a barn. House *v.* House, 5 Har. & J. 125. Or wilfully burning a school-house. Jones *v* Hungerford, 4 Gill & Johns. 402; is actionable *per se*.

Words charging another with the crime of attempting to procure an abortion on a third person, are actionable *per se*. Filben *v.* Dantermann, 23 Wis. 518. But to charge a female with the act of causing or procuring an abortion is not actionable *per se*. Abrams *v.* Foshee, 3 Clarke (Iowa), 271.

To charge another of having stolen and carried away any thing, is to impute the crime of larceny and is actionable *per se*. Coleman *v.* Playsted, 36 Barb. 26. Gaul *v.* Fleming, 10 Ind. 253. Johnson *v.* Shields, 1 Dutch. (N. J.) 116.

doing of any other criminal or indictable offence. But the words conveying only a vague sort of suspicion in the mind of the speaker(*s*), uttered *bonâ fide* with a view of obtaining information, or by way of warning, or spoken in grief and sorrow for the news(*t*) will not create any cause of action, as the circumstances rebut the presumption of malice; nor any words of mere suspicion or opinion, which do not convey any positive imputation of guilt(*u*); but if a man says of another, "I am thoroughly convinced you are guilty of stealing, etc., etc.," this is equivalent to a positive averment of the fact(*v*).

1119 *In what cases actionable words are rendered not actionable by precedent r subsequent words.*—Simply to call a man a "thief" is *primâ facie* actionable, as it imputes felony(*x*), but if it appears that the word was used as a mere term of abuse, and that there was in point of fact no imputation of actual theft conveyed by it, there is no cause of action. Thus, where the defendant said of the plaintiff "he is a damned thief, and so was his father before him," but it appeared that the words were uttered in the heat of anger during a conversation respecting the plaintiff's refusal to pay over some money which he had received as executor, Lord Ellenborough directed a nonsuit, saying that it was manifest from the whole conversation that the words as used did not impute a felony(*y*). The jury ought not to find for the plaintiff, if from the accompanying words or the surrounding circumstances they believe that the defendant did not intend to impute actual theft to the plaintiff(*z*).

Where the defendant said of the plaintiff, "thou art a thief, for thou hast taken my beasts under an execution, and I will hang thee," it was held that there was no actionable slander, for the reason given

To charge another with the commission of a crime is none the less actionable, because the crime was charged as committed in another state. Poe *v.* Grever, 3 Sneed (Tenn.), 664. Johnson *v.* Dicken, 25 Mo. 580.

But words charging another with an attempt to commit a felony, however odious, are not actionable *per se*. Wilson *v.* Tatum, 8 Jones' Law (N. C.), 300.

(*s*) Tozer *v.* Mashford, 6 Exch. 539.

(*t*) Crawford *v.* Middleton, 1 Lev. 82.

(*u*) Com. Dig. Action on the case for Defamation, F. 16.

(*v*) Peake *v.* Oldham, Cowp. 275. Miller *v.* Miller, 8 Johns. 74. Nye *v.* Otis, 8 Mass. 122. Dottarer *v.* Bushey, 16 Penn. St. 204. Cornelius *v.* Van Slyck, 21 Wend. 70. Logan *v.* Steele, 1 Bibb, 593. Gage *v.* Shelton, 2 Rich. 242.

(*x*) McNamara *v.* Shannon, 8 Bush (Ky.), 557. Van Akin *v.* Caler, 48 Barb. 58. Fisher *v.* Rotterean, 2 M'Cord, 189. Hogg *v.* Wilson, 1 N. & M. 216. Little *v.* Barlow, 26 Ga. 423.

(*y*) Thompson *v.* Bernard, 1 Campb. 47. Cristie *v* Cowell, 1 Peake, N. P. C. 5. But where the word "thief" is used the law will presume the intent to impute a crime, unless the contrary intent be shown. M'Kee *v.* Ingalls, 4 Scam. 30.

(*z*) Mansfield, C.J., Penfold *v.* Westcote, 2 B. & P. N. R. 335. McCaleb *v.* Smith, 22 Iowa, 242.

for the plaintiff's being a thief, manifestly showed that he was no thief at all, and that no theft had been committed(*a*).

1120 *Defamatory words imputing to the plaintiff that he is afflicted with a contagious disorder* are actionable *per se*. Thus, to say seriously and positively of a person that he has got the leprosy, or the pox, is actionable, without proof of any special damage, because it causes him to be shunned and avoided by society(*b*). The imputation must refer to the time present, and not to the time past, for words are not actionable which merely impute to the plaintiff that at some previous period he had the disease(*c*).

1121 *Defamatory words concerning tradesmen and professional men*, spoken of them in the way of their trade or profession, will sustain an action when such words would not be actionable when spoken of a person having no trade or profession(*d*). Words imputing to a tradesman fraudulent conduct in the transaction of business, such as the use of false weights, are actionable *per se*, without proof of special damage(*e*); and so are words imputing to a tradesman that he is in the constant habit of cheating and defrauding his customers, and those who deal with him(*f*), and words imputing bankruptcy or insolvency to a person engaged in trade, such as, "if he does not come and make terms with me, I will make a bankrupt of him, and ruin him"(*g*).

(*a*) Wilk's case, 1 Roll. Abr. 51. Brittridge's case, 4 Rep. 19. Bac. Abr. SLANDER, R. Words also which are generally actionable *per se*, are not so when spoken of a transaction not amounting to the crime charged, and known to the hearers to be so spoken. Parmer *v.* Anderson, 33 Ala. 78. Quinn *v.* O'Gara, 2 E. D. Smith (N. Y.), 388. McCaleb *v.* Smith, 22 Iowa, 242. McCarty *v.* Barrett, 12 Minn. 494. Wright *v.* Lindsay, 20 Ala. 428. Ogden *v.* Riley, 2 Green, 186. And see Pegram *v.* Styron, 1 Bailey, 595; Carter *v.* Andrews, 16 Pick. 1; Trabue *v.* Mays, 3 Dana, 138.

Thus the words, "You have cheated and robbed orphan children," taken in connection with other words showing that they charged merely that the person addressed had procured the assignment of a mortgage by some fraud, and were not intended to impute the crime of robbery, were held not to be actionable *per se*. Filber *v.* Dantermann, 28 Wis. 184.

(*b*) Bloodworth *v.* Gray, 7 M. & Gr. 334; 8 Sc. N. R. 9. James *v.* Rutlech, 4 Rep. 17b. Irons *v.* Field, 9 R. I. 216. Williams *v.* Holdredge, 22 Barb. 396. Nichols *v.* Guy, 2 Carter (Ind.), 82. Watson *v.* McCarthy, 2 Kelly, 57.

(*c*) Carslake *v.* Mapledoram, 2 T. R. 475. Irons *v.* Field, 9 R. I. 216. Nichols *v.* Guy, 2 Carter (Ind.), 82.

(*d*) Per. Cur., Harman *v.* Delany, 2 Str. 898. Nelson *v.* Borchenius, 52 Ill. 236. Van Tassel *v.* Capron, 1 Denio, 250. Fowles *v* Bowen, 30 N. Y. 20 Orr *v.* Skofield, 56 Me. 483.

But words not actionable in themselves do not become actionable merely because spoken of one in an office, profession or trade, unless they touch him in his office, profession or trade. Kinney *v.* Nash, 3 N. Y. 177. Van Tassel *v.* Capron, 1 Denio, 250. Ireland *v.* McGarrish, 1 Sandf. (N. Y.) 155.

(*e*) Griffiths *v.* Lewis, 7 Q. B. 65. Any charge of dishonesty against an individual in connection with his business, whereby his character in such business may be injuriously affected is actionable *per se*. Fowles *v.* Bowen, 30 N. Y. 20. Van Tassel *v.* Capron, 1 Denio, 250. Davis *v.* Davis, 1 N. & M. 290. Burtch *v.* Nickerson, 17 Johns. 217. Backus *v.* Richardson, 5 Johns. 476.

(*f*) Reeve *v.* Holgate, 2 Lev. 62.

(*g*) Brown *v.* Smith, 13 C. B. 599. Ld. Denman, C.J., Robinson *v.* Marchant, 7 Q. B. 918.

And it is not necessary that the office or trade should be one of which the court can take judicial notice, for it is actionable, without special damage, to say of a gamekeeper that he kills foxes(*h*).

But "if one tradesman will pretend to be a greater artist than others, it is lawful for them to support their own credit in the same way;" and, consequently, it is not actionable for one tradesman to depreciate the wares and merchandise of another in comparison with his own. So long as it is a mere puff by one of two rival tradesmen, recommending his own articles in preference to those of another, it is defensible on account of the interest the defendant has in the matter; but to say generally of a tradesman that he is in the habit of selling goods which he knows to be bad, is actionable(*i*)

1122 *Words imputing misconduct, or gross ignorance or incapacity to professional men*, in the discharge of their professional duties, are actionable *per se*, without proof of any special damage(*ii*); such as words imputing to a practising physician that he is a quack or a mountebank(*k*), or that he has killed a patient through ignorance of the first principles of his profession(*l*); or words imputing to a surgeon or accoucheur the want of a proper qualification for his profession or business, or the want of skill, or of any professional requisite, or that his character is so bad amongst his professional brethren that they will not meet him(*m*); or to say of a master mariner in command of a vessel that he was frequently drunk, and in that state had to be carried on board his vessel(*n*). But words conveying an imputation against a medical man not necessarily connected with his profession, such as a general imputation of adultery, are not actionable(*o*); but if the statement be, that

Mott *v.* Comstock, 7 Cow. 654. Lewis *v.* Hawley, 2 Day, 495. Davis *v.* Ruff, Cheves, 17. See Phillips *v.* Hoeffer, 1 Penn. St. 62; Windsor *v.* Oliver, 41 Ga. 538.

(*h*) Foulger *v.* Newcomb, L. R., 2 Exch. 327.

(*i*) Evans *v.* Harlow, 5 Q. B. 633. See *ante*, p. 952.

(*ii*) Secor *v.* Harris. 18 Barb. 425.

(*k*) Goddart *v.* Haselfoot, 1 Roll. Abr. 54. White *v.* Carroll, 42 N. Y. 161.

(*l*) Tutty *v.* Alewin, 11 Mod. 221. Words spoken of a physician charging him with ignorance or misconduct in the treatment of a particular case, are not actionable *per se*; but become so if in addition they convey the charge of general professional ignorance, or incompetency, or want of integrity. Camp *v.* Martin, 28 Conn. 86. Jones *v.* Diver, 23 Ind. 184. See Johnson *v.* Robertson, 8 Port. 486. To say of a physician that he is so habitually drunk that he has lost his practice, is not, it seems, actionable. Anonymous, 1 Ham. 83, note.

Where the occupation of a mechanic is one requiring peculiar knowledge and skill, words spoken of the mechanic, in reference to his occupation, imputing to him a want of skill or knowledge of his craft, are actionable *per se*. The authorities do not recognize any distinction in this respect between a learned profession and a mechanical trade. Fitzgerald *v.* Redfield, 51 Barb. 484.

(*m*) Southee *v.* Denny, 1 Exch. 196.

(*n*) Irwin *v.* Brandwood, 33 Law J., Exch. 257.

(*o*) Ayre *v.* Craven, 2 Ad. & E. 2.

he has seduced or committed adultery with one of his patients, it would be otherwise.

Words imputing to a barrister that he has wilfully and corruptly deceived his client, and revealed the secrets of his cause, or that he has given vexatious counsel, and seeks only to fill his own pockets, without regard to the interests of his clients, are actionable(*p*); and so are words imputing to a practising attorney that he is well known to be a corrupt man, and to deal corruptly in his profession(*q*); or words imputing to him that he betrays the secrets of his client, or that he is ignorant of his profession, and is no lawyer, and that fools only go to him for law, or that he is guilty of mal-practice, or is a cheat, a rogue, or a knave in his profession(*r*). But mere vituperative language or general abuse of a professional man is not actionable, unless it has reference to his conduct in his profession. Thus, to call an attorney a cheating knave is not actionable, but to say that he cheats his clients is actionable(*s*). In all actions founded on words imputing to a professional man conduct which disgraces and injures him in his profession, it must be averred and proved that the plaintiff was in the exercise and practice of his profession at the time of the utterance of the slander; for if he has ceased to exercise his profession or employment at the time the words are spoken, the words are not actionable on the ground that they were spoken of him in his profession(*t*).

To say of a beneficed clergyman that he is drunk in church, or that he preaches false doctrine, lies, and malice, and ought to be degraded(*u*), or that he is an old rogue, and a contemptible fellow, hated and despised by his parishioners(*x*), or that he has preached a seditious sermon, and has moved the people to sedition(*y*), is actionable; words also imputing fraudulent and dishonest conduct to a beneficed clergyman in some clerical matter(*z*), or accusing him of incontinence(*zz*), or the preaching of false doctrine, are actionable, as they tend to injure him in his professional character, and, if true, to subject him to a

(*p*) Snag *v.* Gray, 1 Roll. Abr. 57. King *v.* Lake, 2 Ventr. 28.

(*q*) Birchley's case, 4 Rep. 16a, pl. 6.

(*r*) Banks *v.* Allen, 1 Roll. Abr. 54. Baker *v.* Morfue, 1 Sid. 327. Day *v.* Buller, 3 Wils. 59. Garr *v.* Selden, 6 Barb. 416. Rush *v.* Cavenaugh, 2 Barr. 187. Riggs *v.* Denniston, 3 Johns. Cas. 198. Chipman *v.* Cook, 2 Tyler, 456. See Foot *v.* Brown, 8 Johns. 64.

(*s*) Alleston *v.* Moor, Het. 167.

(*t*) Bellamy *v.* Burch, 16 M. & W. 590.

(*u*) Dodd *v.* Robinson, Aleyn, 63. Cranden *v.* Walden, 3 Lev. 17; 1 Roll. Abr. 58. See McMillan *v.* Birch, 1 Binn. 178.

(*x*) Musgrave *v.* Bovey, 2 Str. 946.

(*y*) Brittridge's case, 4 Co. 19b.

(*z*) Pemberton *v.* Colls, 10 Q. B. 461; 16 Law J., Q. B. 408.

(*zz*) Demarest *v.* Harring, 6 Cow. 76.

deprivation of his benefice, and to a degradation of orders, and consequently, to a loss of temporal emolument. But if, at the time of the speaking of the words, the plaintiff is not beneficed, and is not in the actual receipt of professional beneficial emolument as a preacher, lecturer, curate, or the like, there is no actual damage, and an action for slander is not maintainable. "If the plaintiff be in orders merely, and not in possession of any temporal advantage, as having professional occupation, the only remedy appears to be in the Ecclesiastical Court"(*a*). And whenever the words imply only general abuse, and do not affect the plaintiff in his professional and clerical character, they are not actionable without proof of special damage(*b*).

1123 *Words imputing official misconduct to a person in an office of profit or trust* are actionable *per se*. Thus, to say publicly of a man who is in the enjoyment of an office of honor, profit, or trust, that he is wanting in integrity in his office, or that he habitually neglects his official duties, or that he is a corrupt man and takes bribes, is actionable; but if the words merely impute to him want of ability and general unfitness for his post, the words are not actionable without proof of special damage(*c*). Whenever words are sought to be made actionable on the ground that they were spoken of a man in office, it must be shown that they were spoken of him in his character or conduct in his office, and that they impute to him the want of some qualification for, or misconduct in, his office; for if they impute to him only general misconduct and unfitness for his situation, they will fail to support an action, without proof of special damage(*d*).

1124 *Words rendered actionable by reason of special damage.*—If any special damage has been sustained by the plaintiff by reason of the utterance of slanderous words, an action for damages is then maintainable. Thus, to say of a spinster that she is in the family way, or that she has had a child, is not *per se* actionable; but if the girl is about to be married, and she loses her marriage in consequence of the utterance of the slander, a very grave cause of action arises(*e*). If, in

(*a*) Gallwey *v.* Marshall, 9 Exch. 295; 23 Law J., Exch. 73.

(*b*) Pemberton *v.* Colls, *ut supra*.

(*c*) Bac. Abr. SLANDER, B.

(*d*) Lumby *v.* Allday, 1 Cr. & J. 301. Hopwood *v.* Thorn, 8 C. B. 313. Van Tassel *v.* Capron, 1 Denio, 250; Kinney *v.* Nash, 3 N. Y. 177. Oakley *v.* Farrington, 1 Johns. Cas. 129. See also, Forward *v.* Adams, 7 Wend. 204.

(*e*) Davis *v.* Gardiner, 4 Co. 16b, pl. 11. Moody *v.* Baker, 5 Cow. 351. Words imputing to a female a want of chastity are actionable *per se*. Haynes *v.* Ritchey, 30 Iowa, 76. Cox *v.* Bunker, Morris, 269. Smith *v.* Silence, 4 Iowa, 321. Dailey *v.* Reynolds, 4 Greene (Iowa), 374. Wilson *v.* Beighler, 4 Iowa, 427. Truman *v.* Taylor, id. 424. Beardsley *v.* Bridgman, 17 id. 290. Cleaveland *v.* Detweiler, 18 id. 299. Guard *v.* Risk, 11 Ind. 156. Terry *v.* Bright, 4 Md.

consequence of the utterance of slanderous words by the defendant, the plaintiff has lost a situation, or been refused employment, there is special damage resulting from the wrongful act, capable of sustaining an action. Thus, where the plaintiff was chaplain to a peer, and the defendant falsely alleged of him that he had had a bastard, whereby he lost the chaplaincy, it was held that the plaintiff was entitled to maintain an action for compensation in damages on the ground that the chaplaincy was a temporal preferment(*f*). So the loss by a married woman of the society, comfort, and attention of friends by reason of slander, is a sufficient "temporal" damage to sustain an action(*g*), although the loss of her husband's society and conjugal attentions only, has been held insufficient(*h*), unless the slander amounts to an imputation of adultery on the wife, and the husband leaves her in consequence of such imputation(*i*). But words spoken of a married woman imputing want of chastity to her, whereby she was not allowed to continue a member of a religious society do not constitute sufficient temporal damage(*k*).

1125 *Slanderous denunciations from the pulpit causing loss of custom, situation, or employment.*—If a priest or clergyman, or minister of any religious denomination, singles out any particular member of his congregation, and denounces him for misconduct in his trade or

430. Sidgreaves *v.* Myatt, 22 Ala. 617. Frisbie *v.* Fowler, 2 Conn. 707. Laws of New York, 1871, ch. 219.

Thus, words charging a woman with the crime of sodomy, being an imputation of unchastity of the gravest and grossest character are actionable *per se*. Haynes *v.* Ritchey, 30 Iowa, 76. Cleaveland *v.* Detweiler, 18 id. 299.

So words charging a woman with being "a whore" are actionable *per se*. Mayer *v.* Schleichter, 29 Wis. 646. Snediker *v.* Poorbaugh, 29 Iowa, 488. Rodgers *v.* Lacey, 23 Ind. 507 Ranger *v.* Goodrich, 17 Wis. 78. Smith *v.* Silence, 4 Iowa, 321. Cox *v.* Bunker, 1 Morris, 136. Pledger *v.* Hathcock, 1 Kelly, 550. Freeman *v.* Price, 2 Bailey, 115. But see Linney *v.* Maton, 13 Texas, 449. Underhill *v.* Welton, 32 Vt. 40; Boyd *v.* Brent, 3 Brevard, 241.

Words charging an unmarried woman with having had a baby. Beardsley *v.* Bridgman, 17 Iowa, 290. Symonds *v.* Carter, 32 N. H. 458. Worth *v.* Butler, 7 Blackf. 251. Or, of being in a family way, Miles *v.* Vanhorn, 17 Ind. 245; Smith *v.* Minor, Coxe, 16, are actionable *per se*.

And so are words charging a married woman with having a bastard child by her husband before marriage. Murray *v.* Murray, 1 Cinc. (Ohio), 290.

Or charging a woman with being "kept." Downing *v.* Wilson, 36 Ala. 717. M'Brayer *v.* Hill, 4 Ired. 136.

Slight evidence of damage will support an action of slander for imputing to a female a want of chastity in those states where special damages are necessary to sustain the action. Thus, in New York prior to the statute giving an action for damages for words so spoken it was held that refusal of civil treatment at a public house. Olmstead *v.* Miller, 1 Wend. 506; Or being cut off from the hospitality of friends, were sufficient to support the action. Williams *v.* Hill, 19 Wend. 305. Terwilliger *v.* Wands, 17 N. Y. 54, 60.

(*f*) Payne *v.* Beaumorris, 1 Lev. 248.

(*g*) Davies *v.* Solomon, L. R., 7 Q. B. 112.

(*h*) Lynch *v.* Knight, 9 H. of L. Ca. 577.

(*i*) Per Ld. Campbell and Ld. Cranworth, ib. 591, 596.

(*k*) Roberts *v.* Roberts, 33 Law J., Q. B. 249.

profession, or in the execution of any office of trust, or if he defames him generally, and slanders him in the face of the congregation, whereby he loses a situation, or is dismissed from his employment, and sustains special damage, the priest or clergyman will be answerable in damages, if he cannot prove the truth of the charge he makes; for no minister of religion has a right to propagate slander under the guise of disseminating religious truth or repressing vice(*l*).

1126 *Effect of the dismissal of a slandered servant, being a wrongful dismissal on the part of the master.*—Where the plaintiff had been hired by his master by the year, and his master wrongfully dismissed him, in consequence of some slanders respecting him, circulated by the defendant, which were not actionable without special damage, it was held that, as the dismissal was a wrongful act on the part of the master, for which he was answerable in damages to the plaintiff, there was no special damage resulting to the plaintiff capable of sustaining an action against the defendant, "The supposed special damage," observes Lawrence, J., "was the loss of the advantages to which the plaintiff was entitled under his contract with his master; but he could not be considered in law as having lost them, for he still had a right to claim them of his master, who, without a sufficient cause, had refused to continue the plaintiff in his service." "The special damage," further observes Lord Ellenborough, "must be the legal and natural consequence of the words spoken, and here it is an illegal consequence: a mere wrongful act of the master, for which the defendant was no more answerable than if, in consequence of the words, other persons had afterwards assembled and seized the plaintiff, and thrown him into a horsepond, by way of punishment for his supposed transgression"(*m*).

1127 *Effect of the slander being disbelieved by the master.*—If the dismissal of the servant has been caused by the utterance of the slander against him, the special damage results from the slander, so as to render an action maintainable, although the master did not believe in the slander, and did not dismiss the servant because he thought him guilty of the charge made against him, or considered him untrustworthy. Thus, where the plaintiff set forth that she was a straw bonnet maker, in the employ of Mrs. Enoch, and that the defendant, who was the landlord, came to her mistress, and told her that the plaintiff tapped

(*l*) Gilpin *v.* Fowler, 9 Exch. 625; 23 Law J., Exch. 152. Barnabas *v.* Traunter, 1 Vin. Abr. 396.

(*m*) Vicars *v.* Wilcocks, 8 East, 3.

at the windows, and conducted herself shamefully and disgracefully, so that the house looked like a bawdy-house, and Mrs. Enoch dismissed the plaintiff, but stated in her evidence that she did not dismiss her because she believed what the defendant told her, but because he was her landlord, and she was afraid he would be offended if she did not send the plaintiff away after what he had said, it was held that the dismissal was the consequence of the slanderous words, and that damages were recoverable in respect thereof, although the mistress, to whom the slander was uttered, did not believe it(*n*).

1128 *Special damage, not being the immediate and natural consequence of the words spoken — Unauthorized repetition of verbal slander.* — Whenever proof of special damage is necessary to maintain an action of slander, it must appear that the special damage is the immediate and natural consequence of the words spoken(*o*). If, therefore, the use of slanderous words by the defendant, not actionable *per se*, would have wholly failed to produce any injurious consequences, unless aided by the act of another, the injury resulting from that act of the other is not to be ascribed to the defendant. The unauthorized repetition of slanderous words is not the necessary consequence of the original uttering of the words; and the original utterer, therefore, is not responsible in damages for the subsequent repetition of the slander by persons who had no authority from him to repeat what he had said.

Thus, where the substance of the plaintiff's allegation of special damage was, that by reason of the defendant's false representations to divers persons, one John Bryer refused to trust the plaintiff, and the evidence was, that the words were addressed to one Edward Bryce, and that Bryce, at a subsequent time and place, and without any authority from the defendant, repeated the representations to Bryer, so that the repetition of the words, and not the original statement, occasioned the damage, it was held that the action was not maintainable. "Every man," observes Tindal, C.J., "must be taken to be answerable for the necessary consequence of his own wrongful acts; but such a spontaneous and unauthorized communication cannot be considered as the necessary consequence of the original uttering of the words, for no effect whatever followed from the first speaking of the words to Bryce. If he had kept them to himself, Bryer would still have trusted the plaintiff. It was the repetition of them by Bryce

(n) Knight v. Gibbs, 1 Ad. & E. 46.

(o) Vicars v. Wilcocks, 8 East. 3. Terwilliger v. Wands, 17 N. Y. 54, 57. Hastings v. Palmer, 20 Wend. 225. Keenholts v. Becker, 3 Denio, 346. Stevens v. Hartwell, 11 Met. 542. Bassell v. Elmore, 48 N. Y. 561, 564.

to Bryer, which was the voluntary act of a free agent, over whom the defendant had no control, and for whose acts he is not answerable, that was the immediate cause of the plaintiff's damage. We therefore think that, as each count in the declaration alleges as the only grievance the original false speaking of the words, the allegation that, 'by reason of the committing of such grievance, Bryer refused to give the plaintiff credit,' is not made out by the evidence"(*p*)

But where the utterer of the slander directs it to be repeated in any particular quarter, or mentions it to a person whose known duty it is to repeat it, he is responsible for the repetition of it. It is then his act, and is the natural and necessary result of the utterance of the words(*q*).

1129 *Special damage directly resulting from the repetition of oral slander.*—Whenever loss of situation, or employment, or any other special damage is the direct consequence of the utterance of oral slander, the utterer is responsible, whether he is himself the original author of the scandal, or merely repeats what he has heard some one else say. A man cannot by law justify the repetition of slander by merely naming the person who first uttered it; he must also show that he repeated it on a justifiable occasion, and believed it to be true. "As great an injury may accrue from the wrongful repetition as from the first publication or utterance of slander. The person who repeats it may give greater weight to the calumny, and may be actuated by greater malice than the original utterer(*r*).

1130 *Circumstances rebutting the presumption of malice.*—If the circumstances connected with the utterance of the words rebut the presumption of malice, there is no cause of action. Thus, where the plaintiff brought an action against one for falsely and maliciously saying of him that he had heard he was hanged for stealing a horse, and on the evidence it appeared that the words were spoken in grief and sorrow for the news, Hobart, J., caused the plaintiff to be nonsuited, for it was not said maliciously(*s*).

(*p*) Ward *v.* Weeks, 4 M. & P. 808; 7 Bing. 211. Parkins *v.* Scott, 1 H. & C. 153; 31 Law J., Exch. 331.

(*q*) Kendillon *v.* Maltby, Car. & M. 402. Bassell *v.* Elmore, 48 N. Y. 561, 564. Terwilliger *v.* Wands, 17 N. Y. 54. Fowles *v.* Bowen, 30 N. Y. 20. Olmstead *v.* Brown, 12 Barb. 657.

(*r*) M'Pherson *v.* Daniels, 10 B. & C. 273. Lewis *v.* Walter, 4 B. & Ald. 615. Tidman *v.* Ainslie, 10 Exch. 63. See Cummerford *v.* McAvoy, 15 Ill. 311; Moberly *v.* Preston, 8 Mo. 463; Jones *v.* Chapman, 5 Blackf. 88; Church *v.* Bridgeman, 6 Mo. 190; Hampton *v.* Wilson, 4 Dev. 468; Kenny *v.* McLaughlin, 5 Gray (Mass.), 3; Cates *v.* Kellogg 9 Ind. 506; Mapes *v.* Weeks, 4 Wend. 659; Sexton *v.* Todd, Wright, 317; Evans *v.* Smith, 5 Monr. 363; Dole *v.* Lyon, 10 Johns. 447; Trabue *v.* Mays, 3 Dana, 138; Miller *v.* Kerr, 2 M'Cord, 285; Haines *v.* Welling, 7 Ham. 253; Inman *v.* Foster, 8 Wend. 602.

(*s*) Crawford *v.* Middleton, 1 Lev. 82.

1131 *Privileged communications—Proof of malice.*—We have already seen that many communications and statements of a slanderous character are privileged (*ante*, p. 931, *et. seq.*). Where the plaintiff proved that he had been in the service of the defendant, and had been dismissed on a charge of theft, and that he afterwards came to the defendant's house and had some communication with the defendant's servants, when the defendant said to them, "I have dismissed that man for robbing me; do not speak to him any more in public or in private, or I shall think you are as bad as him," it was held, that the statement being honestly made by a master as a warning to his servants was a privileged communication, and that it was incumbent on the plaintiff to give some evidence of malice in order to raise a question for the jury(*t*). And where a vestry meeting was held for the purpose of nominating and electing constables, and hearing and deciding upon any objections that might be brought forward against any of the candidates for the office, and the defendant, a ratepayer, made a statement imputing perjury to the plaintiff, who was one of the candidates, and said that he was a person not to be believed on his oath, it was held that the statement was privileged and protected if it was *bonâ fide* and honestly made in full belief of its truth, and that it was incumbent on the plaintiff to bring forward evidence of his general character for truthfulness, in order to raise the question as to whether the defendant in making the statement has been actuated by any malicious motive(*u*). But although a man who makes a charge against another may be justified by the occasion in making it, yet he may make the charge in such a way, accompanied by such expressions and under such circumstances, as furnish proof that it was made maliciously(*x*). When once a confidential relation is established between two persons with regard to an injury of a private nature, in which they are mutually interested, whatever takes place between them relative to the same subject at subsequent interviews, may be as much privileged as what passed at the original interview(*y*).

1132 *Privileged charges of felony made bonâ fide, with reasonable grounds for suspicion.*—For the sake of public justice, charges and communications which would otherwise be slanderous, are protected if *bonâ fide* made in the prosecution of an inquiry into a suspected crime. "It is

(*t*) Somerville *v.* Hawkins, 10 C. B. 590.
(*u*) Kershaw *v.* Bailey, 1 Exch. 743.
(*x*) Senior *v.* Medland, 4 Jur. N. S. 1069.
(*y*) Beatson *v.* Skene, 5 H. & N. 855. Wallace *v.* Carroll, 11 Ir. C. L. R. 485. Robinett *v.* Ruby, 13 Md. 95.

argued," observes Coleridge, J., "that the charge ought to be true, or ought to be made only before an officer of justice. But the exigencies of society could never permit such a restriction. If I stop a party suspected, must I not say why I do so? The presence of other parties would not do away with the privilege." It is for the jury to say whether the circumstances warranted the charge made by the defendant, whether it was made *bonâ fide*, or before more persons than was necessary, or in language stronger than the occasion justified(*z*).

1133 *Privileged statements and comments by advocates in the course of judicial proceedings, or in the conduct of a cause.*—"If a counsel (or an attorney acting as an advocate) speaks scandalous words against one in defending his client's cause, an action lies not against him for so doing; for it is his duty to speak for his client, and it shall be intended to be spoken according to his client's instructions"(*a*). The freedom of speech at the bar is the privilege of the client vested in the counsel who represents him. It would be impossible properly to conduct a cause in court unless considerable latitude were allowed to the advocate, and if any evil follow therefrom, it must be endured for the sake of the greater good which attends it. "A counsellor, therefore, hath a privilege to enforce anything which is informed unto him for his client and to give it in evidence, it being pertinent to the matter in question, and not to examine whether it be true or false"(*b*). It is pertinent to the cause for counsel to comment both on the facts proved and on those which he might expect to prove, and he may indulge freely in any calumnious imputation which the facts before the court, whether

(*z*) Padmore *v.* Lawrence, 11 Ad. & E. 382. Amann *v.* Damm, 8 C. B., N. S. 597. Words charging theft spoken in good faith to a police officer employed to detect the criminal, are in the nature of a privileged communication and not actionable. Smith *v.* Kerr, 1 Edm. (N. Y.) Sel. Cas. 190.

The action of slander does not lie for a criminal charge made by affidavit before a magistrate. Sanders *v.* Rollinson, 2 Strobh. 447.

But if after the acquittal of the person charged the charge is reiterated, the iteration is not privileged Burlingame *v.* Burlingame, 8 Cow. 141.

A statement to a constable, not made by way of consultation, is not privileged. Burlingame *v.* Burlingame, 8 Cow. 141.

Where the chief of police of a city, upon the information of parties arrested for stealing, called at the place of business of one M. for the purpose of finding the stolen goods, and charged M. with having purchased the goods knowing them to be stolen, it was held that the communication was privileged and not actionable, without proof of actual malice. Mayo *v.* Sample, 18 Iowa, 377.

(*a*) Wood *v.* Gunstone, Styles, 462. Mackay *v.* Ford, 29 Law J., Exch. 404.

(*b*) Brook *v.* Montague, Cro. Jac. 90. Jennings *v.* Paine, 4 Wis. 380. Shelfer *v.* Gooding, 2 Jones' Law (N. C.), 175. Lawson *v.* Hicks, 38 Ala. 279. But this privilege of counsel is to be understood with the limitation that it will not be interposed as a shield to protect one who avails himself of his position to gratify private malice by uttering slanderous expressions against party, witness, or third persons, which have no relation to the subject-matter of the inquiry. Id. Words imputing perjury to a witness are presumptively immaterial. Ring *v.* Wheeler, 7 Cow. 725. Hastings *v.* Lusk, 22 Wend. 410.

true or false, appear to warrant. "It would be impossible," observes Abbott, J., "that justice could be well administered if counsel were to be questioned for the too great strength of their expressions; but they ought not to avail themselves of their situation maliciously to utter words wholly unjustifiable." Where, therefore, an attorney was mixed up in the concoction of a pretended cause of action, and in suing for a sum of money when he knew that there was no legal claim and that the action must fail, and the counsel of the defendant said that the action was founded in the knavery of the attorney, that it was one of the most profligate things ever done by a professional man, and that the attorney was a fraudulent and wicked attorney, it was held that these observations and expressions of opinion were privileged. "Perhaps," observes Lord Ellenborough, "the words were too strong, and, in the exercise of a candor fit to be adopted, might have been spared. But still a counsel might, *bonâ fide*, think the expressions justifiable under the circumstances"(*c*).

1134 *Defamatory statements by a party in open court conducting his own cause* are also privileged and protected, if they are relevant to the subject-matter of inquiry, or are spoken during the heat and excitement of a trial. "The party himself," observes Holroyd, J., "from his comparative ignorance of what is and what is not relevant, may be indulged in a greater latitude, and not be restricted within the same limits as a counsel, whose superior knowledge should be sufficient to restrain him within due bounds"(*d*).

(c) Hodgson *v.* Scarlett, 1 B. & Ald. 241.

(d) Hodgson *v.* Scarlett, 1 B. & Ald. 244; Roll. Abr. 87, pl. 4. Revis *v.* Smith, 18 C. B. 126; 25 L. J., C. P. 195. Ring *v.* Wheeler, 7 Cow. 725. Hastings *v.* Lusk, 22 Wend. 410.

The rule as to the liability of a person for slander, on account of words spoken as a witness, is substantially the same as that which governs the liability of counsel for words uttered in the trial of a cause. If the words spoken were pertinent, and material to the matter in controversy, they are privileged, and the legal idea of malice is excluded. But if they were not pertinent and were not spoken *bona fide*, but for the purpose of defaming some person, they are not privileged and the witness is answerable. Smith *v.* Howard, 28 Iowa, 51. Marsh *v.* Ellsworth, 50 N. Y. 309.

As a general rule, a witness is not liable in an action of slander for words spoken in answer to questions propounded in a judicial investigation by either party. Terry *v.* Fellows, 21 La. An. 375.

And even though the witness be actuated by hatred and ill-will in testifying, yet, if the words uttered by him were pertinent and material to the subject-matter of inquiry, an action of slander will not lie. Calkins *v.* Sumner, 13 Wis. 193. The witness is not bound to determine the materiality of the evidence, and may answer, without liability, questions propounded and not objected to or ruled out by the court. Id.

Where an action of slander is brought against a witness for words spoken on the stand, whether the defendant was protected, under the circumstances, is a question of fact for the jury, and not a question of law for the court. If the jury believe from all the circumstances proved, from the questions put to the witness, from his manner of answering and from the answers themselves, that he testified in good faith, or in the belief that his answers were pertinent or relevant, then the words used by him are deemed privileged, and the law will

1135 *Privileged comments and charges by judges and magistrates in the exercise of the duties of their office.*—We have already seen that judges are not responsible for slanderous words spoken by them concerning private individuals, if the words are material and relevant to the cause or matter in issue before them. "Neither party, witness, counsel, jury, or judge, can be put to answer civilly or criminally for words spoken in office"(*e*). But no judge of an inferior court or magistrate has any immunity for slander; and if he goes out of his way to calumniate an individual by uttering charges wholly irrelevant to the matter in issue before him, and not warranted by the occasion, he will be answerable in damages if malice be clearly made out, and there is a want of reasonable and probable cause for the slanderous observations (*ante*, p. 772). But it is clearly within the sphere of the duty of magistrates to make such comments upon the conduct and demeanor of witnesses and parties coming before them, and upon the character of persons whose conduct is involved in the inquiry before them as the occasion seems to them to warrant, and they are entitled to express their opinions concerning them with the utmost freedom, however erroneous those opinions may be(*f*), provided the proceedings before them are within their jurisdiction, and they have authority to inquire into and adjudicate upon them. An action, therefore, is not maintainable against a coroner for anything said by him whilst he is addressing a jury impaneled before him, however defamatory, false, or malicious in fact it may be(*g*).

1136 *Of the interpretation and application of the words used.*—"In former times," observes Pratt, C.J., "words were construed in *mitiori sensu*, to avoid vexatious actions, which were then very frequent; but *distinguenda sunt tempora*, and we ought to expound words according to their general signification, to prevent scandals, which are at present too frequent"(*h*). "The rule," observes Lord Ellerborough, "which at one time prevailed, that words are to be understood in *mitiori sensu*, has been long ago superseded; and words are now construed by courts as they always ought to have been, in the plain, popular sense in which

protect him; but if, on the contrary, the jury believe, from such evidence, that the witness, in using the words spoken, was actuated by malice, and used the words for the mere purpose of defaming the plaintiff, then the law will not protect him. White *v.* Carroll, 42 N. Y. 161.

Words uttered by a juror in the deliberations of the jury, after they have retired to consider a verdict, are absolutely privileged, whether they are pertinent to the questions arising for decision or not. Dunham *v.* Powers, 42 Vt. 1.

(*e*) Reg. *v.* Skinner, Lofft, 55.

(*f*) Kendillon *v.* Maltby, 2 M. & Rob. 438. Allardice *v.* Robertson, 1 Dow. N. S. 514.

(*g*) Thomas *v.* Chirton, 31 Law J., Q. B. 139.

(*h*) Button *v.* Heyward, 8 Mod. 24.

the rest of the world naturally understands them "(*i*). The effect of the words used, and not the meaning of the party uttering them, is the test of their being actionable. "You must first ascertain the meaning of the words themselves, and then give them the effect any reasonable bystander would affix to them "(*k*).

1137 *Slander of title.*—If lands or chattels are about to be sold by auction, and a man declares in the auction-room, or elsewhere, that the vendor's title is defective, that the lands are mortgaged, or that the chattels are stolen property, and so deters people from buying, or causes the property to be sold for a less price than it would otherwise have realized, this is a slander upon the title of the owner, and gives the latter a claim for compensation in damages, unless the slanderer can prove the truth of his statement(*l*). "An action for slander of title," observes Tindal, C.J., "is not properly an action for words spoken, or for a libel written and published, but an action on the case for special damage, sustained by reason of the speaking or publication of the slander of the plaintiff's title. It is ranged under that division of actions in the Digests, and by other writers on the text law." The plaintiff, therefore, in order to sustain the action, must prove special damage, and there must be an express allegation on the face of the declaration of some particular damage resulting to the plaintiff from the slander. Where, therefore, a shareholder in a mining company complained of a paragraph in a newspaper, asserting that a bill had been filed in Chancery invalidating his title to his shares, whereby he was injured in his rights and his shares were depreciated in the market, and he was prevented from selling them, it was held that this was not such an allegation of special damage as the law required in such actions; and that the necessity for an allegation of special damage does not in anywise depend upon the medium through which the slander is disseminated; that is, whether it be through words, or writing, or print(*m*). "To support the action," observes Parke, B., "it ought to be shown that the false statement was made *mala fide*, and that the special damage ensues therefrom. If some portions of the statement are *bona fide*, the injured party cannot recover, unless

(*i*) Roberts *v.* Camden, 9 East, 96. Woolnoth *v.* Meadows, 5 East, 468. Duncan *v.* Brown, 15 B. Monr. (Ky.) 186. Demarest *v.* Haring, 6 Cow. 76. Ogden *v.* Riley, 2 Green, 186. Butterfield *v.* Buffum, 9 N. H. 156. M'Gowèn *v.* Manifee, 7 Monr. 314. Truman *v.* Taylor, 4 Iowa, 424. Fallenstein *v.* Boothe, 13 Mo. 427. Blickenstaff *v.* Perrin, 27 Ind. 527. Lukehart *v.* Byrely, 53 Penn. St. 418.

(*k*) Hankinson *v.* Bilby, 16 M. & W. 442. Jarnigan *v.* Fleming, 43 Miss. 710.

(*l*) Gutsole *v.* Mathers, 1 M. & W. 501. Wren *v.* Weild, *infra*. Kendall *v.* Stone, 5 N. Y. 14. Beach *v.* Ranney, 2 Hill, 314; 6 Hill, 524. Linden *v.* Graham, 1 Duer (N. Y.), 670.

(*m*) Malachy *v.* Soper, 3 Sc. 737-739.

he can distinctly trace the damage as resulting from that part which is *mala fide*(*n*).

To enable a party, moreover, to maintain an action for slander of title, there must be malice, either express or implied, and the words spoken must go to defeat the plaintiff's title. If the words are spoken by a stranger, who has no right or business to interfere, the law presumes malice; and if he cannot show the truth of his assertion he is responsible in damages; but if he is himself interested in the matter, and announces the defect of title *bona fide*, either for the purpose of protecting his own interest or preventing the commission of a fraud, the legal presumption of malice is rebutted(*o*), and the plaintiff must then show that there was no reasonable or probable ground for the statement. If the alleged slanderer of title is himself interested, or has fair and reasonable ground for believing himself to be interested, in the sale or disposition of the property, the title to which is alleged to be slandered, and has acted *bona fide*, though under the influence of prejudice or misconception, he is not responsible in damages unless it be shown that he must have known that there was not the slightest pretence for his interference. "The *bona fides* of the communication," observes Lord Ellenborough, "and not whether a man of rational understanding would have made it, is the question to be canvassed"(*p*).

In an action for slandering the plaintiff's title to a patent, therefore, it is not sufficient to show that the defendant wrote to persons in negotiation with the plaintiff for the purchase of patented articles from him, stating that such articles were an infringement of a patent of his, the defendant's, and that he should claim royalties from them, if the defendant really had an existing patent for somewhat similar articles, and no evidence of *mala fides* is given(*q*).

"Slander of title," observes Maule, J., "ordinarily means a statement of something tending to cut down the extent of title, which is injurious only if it is false. It is essential to give a cause of action that the statement should be false, and therefore its falsehood is given in evidence under not guilty, since the new rules. It is essential also that it should be malicious; not, as Lord Ellenborough observes, malicious in the worst sense, but with intent to injure the plaintiff. If the statement be true—if there really be the infirmity of title that is

(*n*) Brook *v.* Rawl, 4 Exch. 524.

(*o*) Hargrave *v.* Le Breton, 4 Burr. 2423. Bailey *v.* Dean, 5 Barb. (N. Y.) 297. Smith *v.* Spooner, 3 Taunt. 253. See Steward *v.* Young, L. R., 5 C. P. 122.

(*p*) Pitt *v.* Donovan, 1 M. & S. 648.

(*q*) Wren *v.* Weild, L. R., 4 Q. B. 730. As to slander of title of personal property, see Like *v.* McKinstry, 3 Abb. (N. Y.) App. Decis. 62.

suggested, no action will lie, however malicious the defendant's intention might be. The jury may infer malice from the absence of probable cause, but they are not bound to do so. The want of probable cause does not necessarily lead to an inference of malice, neither does the existence of probable cause afford any answer to the action "(r).

SECTION III.

OF ACTIONS FOR LIBEL AND SLANDER(s).

1138 *Consolidation of actions for the same libel.*—Where seven different actions were brought against the same defendant, for seven different publications of the same libel to different persons, which might all have been comprised in one action, the court stayed the proceedings in all of them, except one, until that one had been tried(t).

1139 *Parties to be made plaintiffs.*—The party to be made plaintiff in an action for libel or slander, is the person to whom the injury immediately accrues, and not the party indirectly or remotely affected by the libel. An action of slander does not lie by two jointly against a defendant, when the tort which one received by the words spoken was not the tort which the other received; but they ought to sever in their actions, as in the case of false imprisonment(u). If, however, defamatory words be spoken of two partners in trade respecting them in their trade, they may maintain a joint action for the slander, averring special damage(x).

1140 *Parties to be made defendants.*—Every publisher and disseminator of written slander is liable to an action for damages, as well as the original inventor, author, or utterer of the calumny. The person who repeats it may, as we have seen, give greater weight to the scandal, and may be actuated by greater malice than the original utterer, and he cannot discharge himself from responsibility by giving up the name of the author or first utterer of the slander. The person slandered

(r) Pater v. Baker, 3 C. B. 838. See Kendall v. Stone, 2 Sandf. 269.
(s) See 30 and 31 Vict. c. 142, s. 10, *ante*, p. 675.
(t) Jones v. Prichard, 6 D. & L. 530; 18 Law J., Q. B. 104.
(u) Dyer, 19a; Burrough, J., Barratt v. Collins, 10 Moore, 451.
(x) Le Fanu v. Malcolmson, 1 H. L. C. 637. Cook v. Batchellor, 3 B. & P. 150; *ante*, p. 717-26; *post*, ch. 21. Taylor v. Church, 8 N.Y. 452.

may, consequently, maintain an action for damages arising from the publication of written slander against the author and first publisher of the slander, as well as against any subsequent publisher or disseminator thereof, unless the publication can be justified or excused(*y*). But in the case of verbal slander, where the action is maintainable only in respect of some special damage that has accrued from the utterance of the slander, the action must, as we have seen, be brought against the person whose wrongful act is the direct and immediate cause of the special damage(*z*).

A corporation aggregate may be made answerable for a libel published by its directions(*a*), although the body corporate had no ill-will to the plaintiff, and did not mean to injure him, for great injustice would be suffered by individuals if their remedy for wrongs authorized by corporations aggregate were to be confined to the agents employed by them. Therefore, where a railway company falsely publish through their electric telegraph that a bank had stopped payment, it was held that the company was responsible in damages for the false and slanderous intelligence(*b*). Where the slander is made by two persons in a joint publication, such as an affidavit sworn by both, they may both be made defendants in one and the same action(*c*), but where slanderous words are spoken by two different persons, separate actions should be brought(*d*).

1141 *Declarations for libel and slander.*—In every declaration for libel or slander, either by publication in writing or by words, the writing or the very words themselves must be set out on the face of the declaration, in order that it may be shown to the court that the words are capable of receiving the inuendo or interpretation put upon them, and of producing the injury which is charged to have resulted from them(*e*); and also that the defendant may know the certainty of the

(*y*) McPherson *v.* Daniels, 10 B. & C. 278. Tidman *v.* Ainslie, 10 Exch. 63.

(*z*) Ward *v.* Weeks, Parkins *v.* Scott, *ante*, pp. 7, 964. See Webb *v.* Cecil, 9 B. Monr. 198.

(*a*) Alexander *v.* North-East. Rail. Co., 34 Law J., Q. B. 152. Aldrich *v.* Press Printing Co., 9 Min. 133; Philadelphia, Wilmington & Baltimore R. R. Co., 21 How. (U. S.) 202.

(*b*) Whitfield *v.* South-East. Rail. Co., Ell. Bl. & Ell. 121; 27 Law J., Q. B. 229.

(*c*) Maitland *v.* Goldney, 2 East, 426.

(*d*) Chamberlain *v.* Goodwin, Cro. Jac. 647. Swithin *v* Vincent, 2 Wils. 227.

(*e*) Gutsole *v.* Mathers, 1 M. & W. 503. Bassett *v.* Spofford, 11 N. H. 127. Watson *v.* Music, 2 Mo. 29. Taylor *v.* Moran, 4 Met. (Ky.) 127. Zeig *v.* Ort, 3 Chand. (Wis.) 26. Whitaker *v.* Freeman, 1 Dev. 271.

In Massachusetts a declaration of slander is sufficient, if it sets forth of what crime the plaintiff was accused, and the substance of the accusing language. Robbins *v.* Fletcher, 101 Mass. 115. Lee *v.* Kane, 6 Gray (Mass.), 495; Laws of 1852, ch. 312. Nye *v.* Otis, 8 Mass. 122. Whiting *v.* Smith, 13 Pick. 364. See Kennedy *v.* Lowry, 1 Binn. 393; Grubbs *v.* Kyser, 2 M'Cord, 305.

Slanderous words spoken in a foreign language, should be set out in the original, with an

charge, and may be able to shape his defence either on the general issue or by plea of justification accordingly; and this defect is not cured by verdict(*f*). "Whenever the charge," observes Holroyd, J., "arises out of the publication of a written instrument, the invariable rule is, that the instrument itself must be set out in the declaration, that the defendant may have an opportunity, if he pleases, of admitting all the facts charged, and of having the judgment of the court whether the facts stated amount to a cause of action; for it is clear, that when it can be shown distinctly what the instrument is upon which the whole charge depends, that instrument must be shown to the court, in order that they may form their judgment upon it. A defendant is not bound to put the question as a combined question of law and fact to the jury, but has a right to put it as a mere question of law to the court. The setting out only the substance and effect of the writing would not only deprive the defendant of that advantage, but also of his writ of error; and it would make the verdict of a jury binding in cases where it ought not to be so "(*g*).

In actions for slandering a man in his trade or profession, the declaration ought not merely to state that such scandalous conduct was imputed to the plaintiff in his profession, but ought also to show in what manner it was connected by the speaker with that profession(*h*).

1142 *Of the inuendo or defamatory sense attributed to the writing or words on the face of the declaration.*—By the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76 (s. 61), it is enacted, that in all actions for libel and slander the plaintiff shall be at liberty to aver in his declaration that the words or matter complained of were used in a defamatory sense, specifying such defamatory sense, without any prefatory averment to show how such words or matter were used in that sense, and such averment shall be put in issue by the denial of the alleged libel or slander; and where the words or matter set forth, with or without the alleged meaning, show a cause of action, the declaration is sufficient(*i*). The pleader, therefore, may put any construction he pleases

averment of their signification in English, and that they were understood by those who heard them. Kerschbaugher *v.* Slusser, 12 Ind. 453. Rehauser *v.* Schwerger, 3 Watts, 28. Wormouth *v.* Cramer, 3 Wend. 394. K—— *v.* H——, 20 Wis. 239. But if the words complained of were spoken in a foreign language, in a place where that language is the one commonly used in conversation, it may not be necessary to aver that they were understood by the hearers. Bechtell *v.* Shatler, Wright, 107.

(*f*) Cook *v.* Cox, 3 M. & S. 116.

(*g*) Wright *v.* Clements, 3 B. &. Ald. 509. Wood *v.* Brown, 6 Taunt. 169.

(*h*) Ayre *v.* Craven, 2 Ad. & E. 7. James *v.* Brook, 9 Q. B. 13. Dicken *v.* Shepard, 22 Md. 399.

(*i*) See Watkin *v.* Hall, L. R., 3 Q. B. 396. In New York it is provided by the Code, that in an action for libel or slander it shall not be necessary to state in the complaint any extrinsic

upon the words, and it is for the jury to determine whether the construction is borne out by the evidence(*k*).

The forms of declaration in the schedule to the above Act merely set forth that "the defendant falsely and maliciously printed and published of the plaintiff, in a newspaper called, etc., the words following, that is to say, etc., meaning thereby," etc., and, in cases of verbal slander, "that the defendant falsely and maliciously spoke and

facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose, but it shall be sufficient to state generally that the same was published or spoken concerning the plaintiff, and if such allegation be controverted, the plaintiff shall be bound to establish, on trial, that it was so published or spoken. Code, s. 164. The Missouri Code of Practice contains a rule of pleading in this class of cases substantially the same. Code, s. 10, art. 7, Stieber *v.* Wensel, 19 Mo. 513.

(*k*) Hemmings *v.* Gasson, Ell. Bl. & Ell. 346; 27 Law J., Q. B. 263. Under the common law rule of pleading in actions of slander, where the words spoken are not actionable *per se*, but are so by reason of their allusion to some extrinsic fact, or of their being used and understood in a sense different from their natural meanings, there must be a prefatory allegation of such extrinsic matter, or explanation of such particular meaning of the words, and the *colloquium* should connect with this introductory matter the speaking of the words complained of leaving to the *inuendo* its proper office of giving to the words the construction borne by them in reference to the extrinsic facts, or to the explanation of their particular meaning. Ward *v.* Colghan, 30 Ind. 395. Watts *v.* Greenleaf, 2 Dev. 115. Linville *v.* Earlywine, 4 Blackf. 470. Palmer *v.* Hunter, 8 Mo. 512. Brown *v.* Brown, 2 Shep. 317. Kinney *v.* Nash, 3 N. Y. 177.

Thus in an action of slander for the speaking of the words "He has sworn false," the complaint or declaration should contain averments of a court, and a cause pending a trial, and testimony given by the plaintiff, and that the defendant spoke the words in a conversation, or *colloquium* had concerning the plaintiff's testimony so given; and that he thereby intended to charge the plaintiff with having committed perjury; and also an *inuendo* showing the injurious sense in which the words were uttered. Sanderson *v.* Hubbard, 14 Vt. 462. Wood *v.* Scott, 13 Vt. 42.

The absence of the *colloquium* in the illustration given would be a fatal defect; and would not be cured by an averment in the *inuendo* that the defendant in speaking the words meant to charge the plaintiff with perjury. Hogan *v.* Wilmoth, 16 Gratt. (Va.) 80. Palmer *v.* Hunter, 8 Mo. 512. Lukehart *v.* Byrely, 53 Penn. St. 418 Phincle *v.* Vaughn, 12 Barb. 215. And see Edgerly *v.* Swain, 33 N. H. 478; Wilson *v.* Hamilton, 9 Rich. Law (S.-C.), 382; Small *v.* Clewley, 60 Me. 262.

The office of an *inuendo* in pleading is to explain and not to extend or enlarge the meaning of words Nichols *v.* Packard, 16 Vt. 83. Evans *v.* Tibbins, 2 Grant's Cas. (Penn.) 451. Taft *v.* Howard, 1 Chip. 275. Cramer *v.* Noonan, 4 Wis. 231. And where words are not in themselves actionable, their meaning cannot be enlarged or extended merely by an *inuendo*. Patterson *v.* Wilkinson, 55 Me. 42. Weed *v.* Bibbins, 32 Barb. 315. Brown *v.* Piner, 6 Bush (Ky.), 513. Watts *v.* Greenleaf, 2 Dev. 115. Emery *v.* Prescott, 54 Me. 389. Caldwell *v.* Abbey, Hardin, 529. Gosling *v.* Morgan, 32 Penn. St. 273. Benaway *v.* Conyne, 3 Chand. (Wis.) 214. Beardsley *v.* Tappan, 1 Blatch. Ct. Ct. 588. Sanderson *v.* Caldwell, 45 N. Y. 398.

"In an action upon the case against a man for saying of another, 'he has burnt my barn,' the plaintiff cannot by way of *inuendo* say, 'meaning his barn full of corn,' because that is not an explanation of what is said before, but an addition to it. But if in the introduction, it had been averred that the defendant had a barn full of corn, and that in a discourse about that barn, the defendant had spoked the words charged, of the plaintiff, an *inuendo* of its being a barn full of corn would be good, for by coupling in the words with the introductory averment, 'his barn full of corn,' it would have made it complete. Here the extrinsic fact that the defendant had a barn full of corn is the introduction or inducement; the allegation that the words were uttered in a conversation relating to that barn, is the colloquium; and the explanation that the words thus spoken were applied to that barn full of corn, is the *inuendo*." De Grey, C.J., in Rex *v.* Horne, Cowp. 672. See Van Vechten *v.* Hopkins, 5 Johns. 211; Bloss *v.* Toby, 2 Pick 320.

published of the plaintiff the words following, that is to say, he is a thief, whereby the plaintiff lost his situation as, etc., in the employ of," etc. Where the words, whether written or spoken, are susceptible of a harmless, but also of an injurious meaning, the injurious meaning must be set out as well as the words, and their true import and signification may be established by evidence of the surrounding circumstances(*l*). When the words are libellous in themselves, no inuendo to explain their meaning is required(*m*). If they are incapable of the interpretation put upon them the declaration is bad, and the court will, if necessary, arrest the judgment. It is not necessary to allege formally that the defendant published the libel, it is sufficient if the circumstances set forth show that the libel was, in point of fact, published(*n*).

1143 *Statement of special damage in actions for verbal slander.*—When the words themselves are not actionable without proof of special damage, the nature of the special damage must be particularized and set forth, in order that the defendant may be enabled to meet the charge. If, by reason of the speaking of the words, the plaintiff has lost the society of friends and neighbors, and the substantial benefits arising from their hospitality, this temporal damage should be particularized, and the names of the neighbors and friends who have refused to receive the plaintiff in their houses, and entertain him at dinner, etc., should be specified(*o*). Where a single woman brought an action against the defendant for saying she was with child, and had miscarried, in consequence of which she lost several suitors, it was held that she ought to have specified the names of these suitors, as they were necessarily within her knowledge(*p*). And where a tradesman complained of a loss of custom as a consequence of the slander, and must have known who his customers were whom he had lost, he was required to state their names on the face of his declaration(*q*). But if the declaration alleges the special damage with as much certainty as the subject-matter is capable of, it is now sufficient. Thus, where the

(*l*) Griffiths *v.* Lewis, 8 Q. B. 851. Gallwey *v.* Marshall, 9 Exch. 294; 23 Law J., Exch. 78.

(*m*) Barrett *v.* Long, 3 H. L. C. 413. More *v.* Bennett, 48 N. Y. 472. Cooper *v.* Greely, 1 Denio, 361. Croswell *v.* Weed, 25 Wend. 621. Weaver *v.* Hendrick, 30 Mo. 502. Burbank *v.* Horn, 39 Me. 233; and, therefore, a plea answering an *inuendo* which is incorrectly stated is bad. Watkin *v.* Hall, *supra*.

(*n*) Baldwin *v.* Elphinston, 2 W. Bl. 1037.

(*o*) Moore *v.* Meagher, 1 Taunt. 39. See Bassell *v.* Elmore, 48 N. Y. 561; Cook *v.* Cook, 100 Mass. 194; Barnes *v.* Trundy, 31 Me. 321.

(*p*) Barnes *v.* Prudlin, 1 Sid. 396.

(*q*) Penn *v.* Dixe, 1 Roll. Abr. 58. Hallock *v.* Miller, 2 Barb. 630. Tobias *v.* Harland, 4 Wend. 537.

declaration alleges that the plaintiff, before the speaking of the scandalous words by the defendant, was employed to preach to a dissenting congregation at a certain licensed chapel, and that he derived considerable profit from his good character and preaching, and that by reason of the scandal of the defendant the persons frequenting the chapel had refused to permit him to preach there, and had discontinued giving him the profits which they would otherwise have given him, it was held that it was not necessary to state the names of the persons who, in consequence of the slander, discontinued giving the plaintiff the emoluments, and that it was sufficient to show that, in consequence of the slander, he was removed from his office, and lost the emoluments of it(*r*). And in an action for slander of the plaintiff in his business of an innkeeper or eating-house keeper, it was held to be sufficient to allege and prove as special damage a general loss of custom from the slander, without stating the names of the customers who ceased to frequent the establishment, as the customers of an inn are travellers and persons passing to and fro, and it might be impossible for the plaintiff to ascertain their names, or the reason why they ceased to frequent the house(*s*).

1144 *What may be given in evidence under the plea of not guilty.*—It is competent to the defendant under the general issue to show that the words were not spoken maliciously, by proving that they were spoken on an occasion or under circumstances which the law, on grounds of public policy, allows; as in the course of a parliamentary or judicial proceeding, or in giving the character of a servant(*t*). If a shareholder in a public company has published letters or writings imputing insolvency to the company, he may, under the plea of not guilty, show that he was actuated by a desire to protect the interests of the shareholders, and had reasonable ground for making the imputation(*u*). The plea of not guilty puts in issue the tendency of the alleged libel, and also the lawfulness of the occasion upon which it was published. The fact, therefore, that a libellous publication was a privileged communication, or that it was a fair comment in a public journal on the acts of a public man, may be given in evidence under this plea, but the latter fact may be pleaded specially in addition to the plea of not guilty. It does not follow that a defence may not be given in evidence

(*r*) Huntley *v.* Herring, 8 T. R. 133.
(*s*) Evans *v.* Harries, 1 H. & N. 251; 26 Law J., Exch. 31.
(*t*) Littledale, J., M'Pherson *v.* Daniels, 10 B. & C. 272. But see Goodwin *v.* Daniels, 4 Allen (Mass.), 61.
(*u*) Metrop. Saloon Omnibus Co. *v.* Hawkins, 4 H. & N. 151; 28 Law J., Exch. 201

under "not guilty," because it might also form the subject of a special plea(x). In an action for slander of the plaintiff in his office, profession, or trade, the plea of not guilty will operate as a denial of speaking the words, or speaking them maliciously, and in the defamatory sense imputed, and with reference to the plaintiff's office, profession, or trade, but it will not operate as a denial of the fact of the plaintiff's holding the office or being of the profession or trade alleged. The innendo or meaning, therefore, attributed to the words in the declaration is put in issue by the plea of not guilty(y).

When the substance of the charge in the declaration is, that the defendant has inflicted injury upon the plaintiff by the speaking of disparaging words, not actionable in themselves, but forming a ground of action, by reason of special damage having arisen from the utterance of them, the plea of not guilty puts in issue all the facts creating the special damage; for without those facts, and without the special damage, there is no wrong of which the plaintiff has any reason to complain(z). Where the words are actionable in themselves without special damage, a traverse of the allegation of the special damage is immaterial and unnecessary. In such a case, if the plaintiff proves his special damage he will recover it; if he fails in proving it, he may still resort to and recover his general damages. A finding upon it, therefore, one way or the other, will have no effect as to the right to the verdict (a). A plea to the damage only is bad, unless the damage is so essentially the cause of action that without it the action could not be maintained(b).

1145 *Plea that the libel was inserted without malice or gross negligence, and that an apology was published—Payment of money into court.*—By 6 and 7 Vict. c. 96, s. 2, it is enacted, that in any action for a libel contained in any public newspaper, or other periodical publication, it shall be competent to the defendant to plead that the libel was inserted without actual malice, and without gross negligence, and that before the commencement of the action, or at the earliest opportunity afterwards, the defendant inserted in such newspaper, or other periodical publication, a full apology for the libel; or, if the newspaper or periodical publication is published at intervals exceeding a week, that he had offered

(x) Lillie v. Price, 5 Ad. & E. 645. Hoare v. Silverlock, 9 C. B. 28. Lucan (Earl of) v. Smith, 26 Law J., Exch. 94. Lewis v. Levy, 27 Law J., Q. B. 287.
(y) Reg. Gen. 16 Vict.; 1 Ell. & Bl. App. lxxxi. R. 16; 15 & 16 Vict. c. 76, s. 61.
(z) Wilby v. Elston, 8 C. B. 149. Norton v. Scholefield, 9 M. & W. 665.
(a) Smith v. Thomas, 2 Sc. 546; 2 B. N. C. 372. Wyatt v. Gore, Holt, N. P. C. 305n.
(b) Robinson v. Marchant, 7 Q. B. 918.

to publish the apology in any newspaper or periodical publication, to be selected by the plaintiff; and that every defendant shall, upon filing such plea, be at liberty to pay into court a sum of money by way of amends for the injury sustained(*c*). To entitle the defendant to the benefit of an apology under this statute, the apology should be printed in such a part of the paper, and in such a type, as will be likely to insure its perusal by the persons who read the libel, or by all who read the paper(*d*).

Where a plea denying actual malice, and stating the publication of an apology is pleaded, the publication of previous libels on the plaintiff by the defendant is admissible in evidence, to show that the defendant wrote the libel in question with actual malice. A long practice of libelling the plaintiff may show in the most satisfactory manner that the defendant was actuated by malice in the particular publication, and that it did not take place through carelessness or inadvertence; and the more the evidence approaches to the proof of a systematic practice, the more convincing it is. The circumstance that the other libels are more or less frequent, or more or less remote from the time of the publication of the libel in question, merely affects the weight, not the admissibility of the evidence(*e*).

1146 *Pleas of justification.*—To enable the defendant to give the truth of the charge or imputation in evidence as a defence to the action, the defendant must plead a plea of justification, alleging that the plaintiff did the act imputed to him by the libel, and that the defendant therefore published or spoke the words of which the plaintiff complains(*f*). Every plea of justification must meet and justify the charge or complaint set out on the face of the declaration. If it does not do this, reasonably and substantially, it is a nulity(*g*). It must also,

(*c*) The special plea of apology and payment into court cannot be pleaded along with not guilty to the same part of the declaration. O'Brien *v.* Clement, 15 M. & W. 435.

(*d*) Lafone *v.* Smith, 7 W. R. 13.

(*e*) Barrett *v.* Long, 3 H. L. C. 414.

(*f*) Smith *v.* Richardson, Willes, 20. Barrows *v.* Carpenter, 1 Clifford, C. C. 204. Torrey *v.* Field, 10 Vt. 353. Barns *v.* Webb, 1 Tyler, 17. Hagan *v.* Hendy, 18 Md. 177. Haws *v.* Stanford, 4 Sneed (Tenn.), 520. Eagan *v.* Gantt, 1 M'Mullan, 468.

(*g*) Tighe *v.* Cooper, 7 Ell. & Bl. 639; 26 Law J., Q. B. 215. Wyatt *v.* Gore, Holt, N. P. C. 308, n. Sanford *v.* Gaddis, 13 Ill. 329. Torrey *v.* Field, 10 Vt. 353. Fidler *v.* Delavan, 20 Wend. 57. Fero *v.* Rusco, 4 N. Y. 162. McKinley *v.* Rob, 20 Johns. 351. Skinner *v.* Powers, 1 Wend. 451. Swann *v.* Rary, 3 Blackf. 296. Holton *v.* Muzzy, 30 Vt. 365. Van Derveer *v.* Sutphin, 5 Ohio (N. S.), 293. Great certainty of averment is necessary in a plea of justification to a slander or a libel. The defendant is not bound to justify any forced construction given to the slanderous matter by way of inuendo, but he is bound to justify in the sense in which the inuendoes explain such matter if they explain it fairly. The courts require more than a mere literal justification. Ames *v.* Hazard, 8 R. I. 143. See Snow *v.* Wichter, 9 Irod. 346. A justification to a charge that the plaintiff swore falsely on a trial, should set forth the evidence

where the libel is in writing, justify everything contained in the libel which is injurious to the plaintiff. If it imputes to the latter that he has been guilty of some act that is discreditable to him as a gentleman, as well as of a criminal offence, the plea of justification must cover the whole charge(*h*). But if the libel contains several charges, the defendant may justify some of them, and plead not guilty as to others(*i*). A plea of justification, imputing general misconduct to the plaintiff, and giving no specific instances of it, was formerly held bad on special demurrer(*k*). A defendant, for example, was not at liberty to charge a plaintiff with swindling, without showing any special instances of it on the record, that the plaintiff might come prepared to meet them(*l*).

The publication and dissemination of written or printed slander cannot be justified, as we have seen, on the ground that the libellous matter was previously published by a third person, and that the defendant, at the time of his publication, disclosed the name of that person, and believed all the statements contained in the libel to be true(*m*).

1147 *Evidence for the plaintiff (n)—Printed placards—Proof of publication.* —If a man writes a libel, and puts it into his desk, this is no publi-

given on the trial, and state what was actually sworn to by the plaintiff. Tilson *v.* Clark, 45 Barb. 178. See Sanford *v.* Gaddis, 13 Ill. 329.

The defendant must justify by stating the particular facts which evince the truth of the imputation, whether the imputation upon the plaintiff's character be of a general or specific nature. A mere general averment of the truth of the libellous matter is insufficient, and is a mere repetition of the libel. Wachter *v.* Quenzer, 29 N. Y. 547. Attoberry *v.* Powell, 29 Mo. 429.

The answer must also aver the truth of the defamatory matter charged and not merely set out facts tending to show the truth. Trail *v.* Smiley, 9 Cal. 529.

(*h*) Helsham *v.* Blackwood, 11 C. B. 128. Mountney *v.* Watton, 2 B. & Ad. 673. State *v.* Burnham, 9 N. H. 34. Stilwell *v.* Barter, 19 Wend. 487.

Where a defendant justifies words which amount to a charge of felony, and proves his justification, and obtains a verdict, it has been said that the plaintiff may afterwards be put upon his trial for the felony by that verdict without the intervention of a grand jury. Ld. Kenyon, Cook *v.* Field, 3 Esp. 134.

(*i*) M'Gregor *v.* Gregory, 11 M. & W. 287. Van Derveer *v.* Sutphin, 5 Ohio (N. S.), 293. See Ames *v.* Hazard, 6 R. I. 335.

(*k*) Hickinbotham *v.* Leech, 10 M. & W. 361. O'Brien *v.* Clement, 16 Ib. 165.

(*l*) Buller, J., J'Anson *v.* Stuart, 1 T. R. 753; 2 Smith's L. C., 6th ed. 57-70.

(*m*) Tidman *v.* Ainslie, 10 Exch. 63. M'Pherson *v.* Daniels, 10, B. & C. 273, overruling the 4th resolution in Lord Northampton's case, 12 Rep. 134. See *ante*, p. 923; McDonald *v.* Woodruff, 2 Dill. 244; Sans *v.* Joerris, 14 Wis. 663. See Runkle *v.* Meyer, 3 Yeates, 518; Dole *v.* Lyon, 10 Johns. 447.

Nor is it any justification that the printer did not know the person libelled. Dexter *v.* Spear, 4 Mason, 115.

(*n*) As to particulars, where the action is for stating that chattels sold by the plaintiff were infringements of the defendant's patents, see Wren *v.* Weild, L. R., 4 Q. B. 213. And see, as to an injunction against a patentee from publishing statements of his intention to institute legal proceedings, in order to deter persons from purchasing alleged infringements of his patent, if he has no *bona fide* intention to follow up his threats by taking such proceedings, Rollins *v.* Hinks, L. R., 13 Eq. Ca. 355.

cation of it; but if a libellous paper or placard has been notoriously circulated or posted up in places of public resort, proof of a paper in the defendant's handwriting, corresponding with the libellous placard, will be *primâ facie* evidence against him of his being the author of the libel, and render it necessary for him to explain the matter(*o*). A libellous paper in the handwriting of the defendant, found in the house of the editor of a newspaper, in which the libel complained of appeared, is admissible in evidence against the defendant, notwithstanding several parts of it have been erased and are omitted in the newspaper, provided the passages erased do not qualify the libel(*p*). If the libel on which the action is founded contains any marked peculiarities in spelling, style, or composition, letters of the defendant concerning the plaintiff containing similar peculiarities are admissible in evidence, to show that the defendant was the writer of the libel(*q*). The 2 & 3 Vict. c. 12, s. 2, which is re-enacted by the 32 & 33 Vict. c. 24, requires every person who prints any paper or book intended to be published or dispersed, to print his name and place of abode or business upon the front of such paper, or upon the first and last leaves of every paper or book consisting of more than one leaf, on pain of forfeiting 5*l.* for each copy so printed.

If in an action for slanderous words it be proved that some person took down the words, that will not prevent another witness from giving parol evidence of what the words were(*r*). If a party makes a memorandum of particular facts and circumstances at the time they occur, and has not the paper with him, he may nevertheless give oral evidence of the facts independently of the writing(*s*); but the non-production of the writing is of course matter for comment and observation.

Where a defendant, who had a copy of a libellous caricature in his house, showed it to another on being requested so to do, Lord Ellenborough ruled that this was not sufficient evidence of publication to support an action(*t*).

Libellous matter contained in a private letter addressed to the plaintiff himself, and only delivered into his own hands, is not such a pub-

(*o*) Rex *v.* Beare, 1 Ld. Raym. 417. Lamb's case, 9 Co. 59b. Rex *v.* Burdett, 3 B. & Ald. 717; 4 B. & Ald. 95. Giles *v.* State, 6 Ga. 276.

(*p*) Tarpley *v.* Blabey, 2 B. N. C. 437.

(*q*) Brookes *v.* Titchborne, 5 Exch. 929. See Callan *v.* Gaylord, 3 Watts, 321.

(*r*) Sheridan's case, 31 How. St. Tr. 673. On proof of loss of a paper containing a libel, secondary evidence of the making, contents, and publication may be given. Gates *v.* Bowker, 18 Vt. 23. Weir *v.* Hoss, 6 Ala. 881. But see Simpson *v.* Wiley, 4 Port. 215.

(*s*) Thistlewood's case, 33 ibid. 758.

(*t*) Smith *v.* Wood, 3 Campb. 323.

lication of a libel as will support an action(*u*). But where it was proved that the defendant addressed a libellous letter to the plaintiff, knowing that the plaintiff's clerk, in the absence of the plaintiff, was in the habit of opening the plaintiff's letters, and the letter was, in point of fact, received and opened by the clerk before it reached the plaintiff's hands, Lord Ellenborough held that there was sufficient evidence for the jury to consider whether the defendant did not intend to put the clerk in possession of the letter, and that if he did, there would be a publication of its libellous contents(*x*). The sending of a letter to a wife containing libellous charges against her husband is a sufficient publication of the libel; for, to injure a man's character with his wife, or to assail his honor by communications made to her, is to do him a grievous wrong(*y*).

If a letter is sent by post, it is *prima facie* evidence that the person to whom it was addressed received it in due course(*z*).

Where the defendant's daughter had been employed by him to make out his bills and write letters for him on matters of business, and the daughter wrote and published a libel upon the plaintiff in her father's (the defendant's) name, it was held that this was not sufficient to fix him with the authorship of the libel; for the principal is only responsible for the acts of his agent within the limits of the authority delegated to the agent, and that it did not follow, from a daughter being employed to make out bills and write letters for her father for the purpose of conducting his business, that she was authorized by him to write a libel; and that there ought to be some evidence to show that the libel was written either by the command, or with the knowledge, of the defendant(*a*). But if a man request another generally to write a libel, he is answerable for the libel written pursuant to his request, and must take his chance of what appears. He is responsible, though something may be added which he did not state(*b*).

1148 *Publication in newspapers.*—Every sale of a newspaper to a person sent to purchase it is a fresh publication, and, therefore, where an

(*u*) Phillips *v.* Jansen, 1 Esp. 625. Peacock *v.* Reynal, 2 Brownl. 151. McIntosh *v.* Matherly, 9 B. Mon. 119. Lyle *v.* Clason, 1 Cai. 581.

But reading a libellous letter to a stranger before mailing it is proof of publication. Snyder *v.* Andrews, 6 Barb. 43.

(*x*) Delacroix *v.* Thevenot, 2 Stark. 63.

(*y*) Wenman *v.* Ash, 13 C. B. 842; 22 Law J., C. P. 190.

(*z*) Warren *v.* Warren, 1 Cr. M. & R. 250.

(*a*) Harding *v.* Greening, 1 Moore, 479.

(*b*) Reg. *v.* Cooper, 8 Q. B. 536. Evidence that one person communicated to another, partly in writing and partly in conversation, the materials from which the latter composed a libel, will not be proof of a publication by the former. Cochran *v.* Butterfield, 18 N. H. 115.

action was brought in respect of a libel in a newspaper, published seventeen years before the action, and the Statute of Limitations was pleaded, it was held that the plea was negatived by proof that a copy of the paper had been purchased from the defendant by the plaintiff's servant, sent to obtain it, within the six years. And where the proof of publication relied on was the sale of a copy of a newspaper to a messenger sent by the plaintiff to procure it, who, on receiving it, carried it to the plaintiff, it was held that this was a sufficient publication to sustain an action for damages; for a defendant who, on the application of a stranger, delivers to him the writing which libels a third person, publishes the libellous matter to such stranger, though he may have been sent for the work by the plaintiff himself(*c*).

If a man wraps up a newspaper, and sends it into another county by a boy, the man who sends the paper is the publisher of it, and not the boy, who is ignorant of the contents of the paper, and is an innocent agent in the transaction(*d*).

1149 *Proprietorship of newspapers containing libels.*—The provisions of the 32 & 33 Vict. c. 24, as to the printing the name of the printer on every paper or book intended for publication, have been mentioned (*ante*, p. 879). That Act further re-enacts the 19th section of the 6 & 7 Will. 4, c. 76(*e*), which provides, that if any person shall file a bill for the discovery of the name of any printer, publisher, or proprietor of a newspaper, in order more effectually to bring or carry on an action for libel, it shall not be lawful for the defendant to plead or demur to such bill; but the defendant shall be compellable to make the discovery required. It has accordingly been held that a bill against the publisher of a newspaper to discover the name of the proprietor is not demurrable(*f*); such discovery, however, is not to be made use of

(*c*) Brunswick (Duke of) *v.* Harmer, 1 Q. B. 189. Publication of libellous matter in a newspaper is sufficiently shown by proof of the distribution and sale of the paper by an agent. Respublica *v.* Davis, 3 Yeates, 128.

Evidence that a newspaper came from defendant's office, and is a copy of an edition of the same date, is proof of publication. State *v.* Jeandell, 5 Harring. (Del.) 475.

It is not necessary to produce a copy which has actually been published, but proof may be given that papers of the same kind were published. Simmons *v.* Holster, 13 Minn. 249. Huff *v.* Bennett, 4 Sandf. (N. Y.) 120. See Laughlin *v.* Russell, 17 Ohio, 475. See Woodburn *v.* Miller, Cheves, 194.

That a publisher is responsible for whatever appears in his paper, see Buckley *v.* Knapp, 48 Mo. 152.

(*d*) Best, J., Rex *v.* Burdett, 4 B. & Ald. 126. Proof of the delivery, by order of the defendant, of a copy of a newspaper to the officer at the Stamp Office, was held to be proof of publication in Rex *v.* Amphlit, 4 B. & C. 35.

(*e*) The 6 & 7 Will. 4, c. 76, is repealed by the 33 & 34 Vict. c. 99.

(*f*) Dixon *v.* Enoch, L. R., 13 Eq. Ca. 394. Whether it would lie against a mere stranger who happened to know the name of the proprietor, *quære*. *S. C.*

against the defendant in any other proceeding than that for which the discovery is made.

1150 *Proof of the utterance of the words charged in actions for verbal slander.*—The plaintiff need not prove all the words laid in the declaration, but he must prove so much of the very words alleged to have been spoken as is sufficient to sustain his cause of action; and it is not enough for him to prove equivalent words of slander(*g*); but if the words proved in evidence convey substantially the same imputation, and the only difference is that the same thing is expressed in a different form of words, or is proved to have been done in a different way from that charged in the declaration, the variance may be amended at the trial(*h*). If words alleged to have been spoken affirmatively were only put interrogatively, or if they convey quite a different imputation from that charged in the declaration, the defect cannot be amended(*i*).

1151 *Proof of the singing of libellous songs.*—Where a libellous song was sung in the streets from a printed paper, which had been destroyed,

(*g*) Maitland *v.* Goldney, 2 East, 437. Orpwood *v.* Barkes, 4 Bing. 268. See Rainy *v.* Bravo, *infra*; Bundy *v.* Hart, 46 Mo. 460; Berry *v.* Dryden, 7 Mo. 324; Birch *v.* Benton, 24 Mo. 163; Pennington *v.* Meeks, 46 Mo. 217; Wilborn *v.* Odell, 29 Ill. 456; Birch *v.* Benton, 26 Mo. 153; Sanford *v.* Gaddis, 15 Ill. 228; Easley *v.* Moss, 9 Ala. 266; Whiting *v.* Smith, 13 Pick. 364; Purple *v.* Horton, 13 Wend. 9; Chandler *v.* Holloway, 4 Port. 17; Loomis *v.* Swick, 3 Wend. 205; Olmsted *v.* Miller, 1 Wend. 506; Fox *v.* Vanderbeek, 5 Cow. 513.

(*h*) *Post*, ch. 21, s. 1. AMENDMENT. In an action of slander it is not necessary to prove the precise words averred in the petition, but it is sufficient to prov · them substantially as therein set out. Desmond *v.* Brown, 29 Iowa, 53. McClintock *v.* Crick, 4 Iowa, 453. Kennedy *v.* Lowry, 1 Binn. 393. Miller *v.* Miller, 8 Johns. 74. Grubbs *v.* Kyzer, 2 M'Cord, 304. Scott *v.* McKinnish, 15 Ala. 662. Cooper *v.* Marlow, 3 Mo. 188. Purcell *v.* Archer, Peck, 317. Cheadle *v* Buell, 6 Ham. 67.

Proof of words spoken in addition to those set out in the declaration, but which do not qualify the words alleged so as to free them from their slanderous quality, will not affect the right to recover. Crotly *v.* Morrissey, 40 Ill. 477. Baker *v.* Young, 44 Ill. 42. Merrill *v* Peasley, 17 N. H. 540. Wilborn *v.* Odell, 29 Ill. 456. Sanford *v.* Gaddis, 15 Ill. 228. Cooper *v.* Marlow, 3 Mo. 188.

The old rule of evidence that the precise words must be proved, has only been relaxed so far as to admit proof of the substance of the words. It is not enough to prove words of the same effect, or conveying the same idea. The words must be substantially the same, and not merely equivalent. Taylor *v.* Moran, 4 Met. (Ky.) 127. Smith *v.* Hollister, 32 Vt. 695. Norton *v.* Gordon, 16 Ill. 33. Moore *v.* Bond, 4 Blackf. 458. But see Williams *v.* Miner, 18 Conn. 464.

A variance between the pleadings and proof as to the time of uttering a slander is immaterial. Potter *v.* Thompson, 22 Barb. 89. Pegram *v.* Stoltz, 67 N. C. 144.

Proof of slanderous words uttered conditionally will not support an averment of slanderous words uttered unconditionally. Evarts *v.* Smith, 19 Mich. 55. But see Pegram *v.* Stoltz, 67 N. C. 144; Treat *v.* Browning, 4 Conn. 408.

An allegation of words used in the third person is sustained by proof of words spoken in the second person. Daily *v.* Gaines, 1 Dana, 529. Huffman *v.* Shumate, 4 Bibb, 515. But see the contrary, Williams *v.* Harrison, 3 Mo. 411; Wolf *v.* Rodifer, 1 Har. & J. 409; Miller *v.* Miller, 8 Johns. 74.

(*i*) Barnes *v.* Holloway, 8 T. R. 150. Bell *v.* Byrne, 13 East, 563. Walters *v.* Mace, 2 B. & Ald. 756. Cartwright *v.* Wright, 5 B. & Ald. 616. Brooks *v.* Blanshard, 1 Cr. & M. 791. See Sheridan's case, *ante*, p. 960.

the singer of the song was allowed to prove that a paper produced was an exact copy of the song that was sung(*k*). Where a number of placards are printed by order of the defendant, no one of the printed papers is an original more than the rest. When they are printed they all become originals, and the manuscript is discharged(*l*).

1152 *Application of the libel to the plaintiff.*—If the libellous words point to no person in particular, it becomes a question of evidence whether they do or do not apply to the plaintiff(*m*). If the name of the person libelled is left in blank, or is designated by asterisks, evidence may be given to show who was meant. "It is not necessary that all the world should understand the libel; it is sufficient if those who know the plaintiff can make out that he is the person meant."(*n*). Where a class is described, it may very well be that the slander refers to a particular individual. That is a matter of which evidence is to be laid before a jury, and the jurors are to determine whether, when a class is referred to, the slander was pointed at the plaintiff(*o*). Where, however, it appears, from the matter complained of, that there was not any intention of libelling any particular individual, but that the imputations intended to be conveyed were meant to be cast upon the public authorities, or some of the several public functionaries, the plaintiff cannot recover(*p*).

1153 *Proof of the defamatory sense of the words used.*—It must appear to the court, from the words set out in the declaration, that they are capable of conveying or bearing the defamatory meaning assigned to them; and if so, it is for the jury to determine whether, in point of fact, the construction put upon the words by the plaintiff is borne out by the evidence(*q*). When the words are susceptible of a harmless meaning, it is for the plaintiff to show that they were used in a libellous and not in a harmless sense. If the plaintiff attributes to them a much wider and more extensive meaning than they fairly warrant, or the words do not fairly bear the meaning imputed to them, the

(*k*) Johnson *v.* Hudson, 7 Ad. & E. 233, n. See Rainy *v.* Bravo, L. R., 4 P. C. 287.

(*l*) Rex *v.* Watson, 2 Stark, 130.

(*m*) Merywether *v.* Turner, 19 Law J., C. P. 10. Under a complaint alleging the meaning of certain words, and that they referred to the plaintiff, it is proper to prove by witnesses what they understood by the words, and of whom they were published. De Armond *v.* Armstrong, 37 Ind. 35. Smart *v.* Blanchard, 42 N. H. 137. But see Kangler *v.* Hummell, 37 Penn. St. 130.

(*n*) Bourke *v.* Warren, 2 C. & P. 310.

(*o*) Le Fanu *v.* Malcolmson, 1 H. L. C. 637.

(*p*) Solomon *v* Lawson, 8 Q. B. 823.

(*q*) Solomon *v.* Lawson, *ut sup.* Hemmings *v.* Gasson, *ante*, p. 974. Homer *v.* Taunton, 5 H. & N. 663; 29 Law J., Exch. 318. Smith *v.* Miles, 15 Vt. 245. Usher *v.* Severance, 2 App. 9. Turrill *v.* Dolloway, 26 Wend. 383. Jones *v.* Rivers, 3 Brevard, 95.

defendant will be entitled to a verdict(*r*), unless the words are manifestly libellous as they stand, and require no meaning to be assigned to them; in which case the meaning assigned to them by the plaintiff may be rejected as surplusage(*s*). An insensible or repugnant meaning may be rejected as surplusage on demurrer, or on motion in arrest of judgment; but a plaintiff who has by his declaration assigned a particular meaning to equivocal words, which are not necessarily slanderous, and fails to establish that meaning by his evidence, cannot reject the meaning he has himself adopted, and resort to another interpretation of the words(*t*).

Where the words used have an equivocal meaning, but are well understood and known in a libellous sense, it is for a jury to say whether they were used in that sense or not(*u*). "We ought to attribute," observes Coleridge, J., "to a jury an acquaintance with ordinary terms and allusions, whether historical, or figurative, or parabolical. If an expression, originally allegorical, has passed into such common use that it ceases to be figurative, and has obtained a signification almost literal, we must understand it as it is used." The term "frozen snake," has an application very generally known, which is calculated to bring into contempt a person against whom it is directed. If therefore, a publication imputes to a person that his friends, who have been assisting him, have realized in him the fable of the frozen snake, it is for a jury to say whether these words do not convey an imputation of ingratitude to friends and benefactors, and if they do they are actionable(*x*).

If the meaning is so obscure and doubtful as to render the document incomprehensible, it is not actionable, although the plaintiff's name may be mentioned therein in an impertinent manner, and the publication may have been evidently intended to vex and annoy him(*y*).

In an action for words, some of which, if spoken and understood in their ordinary sense, would certainly be actionable, the jury may consider whether, taking the whole of the conversation together, the

(*r*) Broom *v.* Gosden, 1 C. B. 732. Williams *v.* Gardiner, 1 M. & W. 249.

(*s*) Harvey *v.* French, 1 Cr. & M. 11. Roberts *v.* Camden, 9 East, 92. See Hudson *v.* Garner, 22 Mo. 423; Rodelbaugh *v.* Hollingsworth, 6 Ind. 339.

(*t*) Williams *v.* Stott, 1 Cr. & M. 689. Smith *v.* Carey, 3 Campb. 461. Sellers *v.* Till, 4 B. & C. 655.

(*u*) Wakley *v.* Healey, 7 C. B. 605. Baboneau *v.* Farrell, 15 C. B. 360. Greville *v.* Chapman, 5 Q. B. 745. Smith *v.* Miles, 15 Vt. 245. Usher *v.* Severance, 2 App. 9. Turrill *v.* Dolloway, 26 Wend. 383. Jones *v.* Rivers, 3 Brevard, 95. Welsh *v.* Eakle, 7 J. J. Marsh. 424. Davis *v.* Johnston, 2 Bailey, 579. Creiger *v.* Bunton, 2 Rich. 395.

(*x*) Hoare *v.* Silverlock, 12 Q. B. 624. See Cox *v.* Lee, L. R. 4 Exch. 284; 38 Law J., Exch. 219. See Wachter *v.* Queenzer, 29 N. Y. 547.

(*y*) Capel *v.* Jones, 4 C. B. 263.

particular words are so qualified by the other parts of the conversation as to show that they were not intended to give the idea which their ordinary and primary meaning would give(z). If the words themselves are not of a defamatory character, they are not actionable, although special damage may have resulted to the plaintiff from the utterance of them. There is no ground for presuming malice from the utterance of words innocent in themselves, and a jury cannot infer it. Thus, where the plaintiff, a serving-maid and shopwoman, alleged in her declaration that the defendant maliciously spoke these words concerning her,—"She (the plaintiff) secreted 1*s.* 6*d.* under the till, stating that these are not times to be robbed;" and that by reason of the speaking of these words by the defendant she had been refused a situation, it was held that, as the words did not of necessity import anything injurious to the plaintiff's character, they were not capable of sustaining an action, although they had been followed by special damage. "It is said," observes Patteson, J., "that the words are actionable, because a person, after hearing them, chose in his caprice to reject the plaintiff as a servant. But if the matter was not in its nature defamatory, the rejection of the plaintiff cannot be considered the natural result of the speaking of the words. To make the speaking of the words wrongful, they must in their nature be defamatory"(a).

1154 *Admissibility of evidence of surrounding circumstances to explain and point the libel—Interpretation of the words used.*—The ordinary popular sense of the writing, language, or words alleged to be libellous or defamatory, is to be taken to be the meaning of the printer, publisher, or speaker of them (*ante*, p. 968); but a foundation may be laid for showing another and different meaning. Something may have previously passed which gives a peculiar character and meaning to some expression; and some word, which ordinarily, or popularly is used in one sense, may, from something that has gone before, have a meaning different from its usual one. When, therefore, it is wished to get rid of the ordinary meaning, the witness must be asked if there was anything to prevent those words from conveying the meaning they ordinarily would convey; and if evidence is given, and a foundation laid for it, then the further question may be put, "What did you understand by them?"(b). It must be first shown that the word is used in,

(z) Shipley v. Todhunter, 7 C. & P. 680.

(a) Kelly v. Partington, 5 B. & Ad. 651.

(b) Daines v. Hartley, 3 Exch. 205. Smart v. Blanchard, 42 N. H. 137. See Hawks v. Patton, 18 Ga. 52; McLaughlin v. Russell, 17 Ohio, 475.

But when words charged as slanderous have a fixed and unambiguous meaning, it is not

and has acquired, a peculiar sense, and then a witness may be asked whether he understood it in that sense. The phrase "lame duck," would be actionable if applied to a person on the Stock Exchange, because there it has acquired a particular meaning, which could be shown. So of the word "black sheep," as applied to an attorney; or of the word "blackleg," if it can be shown that it had acquired a similar signification as applied to gamesters(*c*).

The defendant has a right to have the whole of the publication read, in order that the meaning of particular passages may be illustrated and explained by the context of the whole writing(*d*); and in an action for oral slander, he is entitled to have the whole conversation of which the slanderous words formed part given in evidence, in order to explain the meaning of particular expressions, and to show that they did not convey the imputation sought to be fastened upon them.

1155 *Proof of subsequent libels to explain and point the libel charged in the declaration* may be given, but if the evidence is offered for the mere purpose of swelling the damages it will be rejected. "The distinction," observes Lord Abinger, "is, you may give evidence of subsequent words to explain the words in the declaration: but when there is nothing equivocal in the words charged, you cannot give evidence of subsequent words of the same import, for which subsequent words another action may be brought and damages recovered; inasmuch as the record in this action would be no bar to a subsequent action for the same words, though the evidence now offered would tend to aggravate the damages in this "(*e*).

1156 *Proof of successive libels to show malice.*—As the spirit and intention of the person publishing a libel are fit to be considered by a jury in estimating the injury done to the plaintiff, evidence tending to prove it cannot be excluded simply because it may disclose another and different cause of action; but whenever the evidence given does disclose another cause of action, the jury should be cautioned against giving any damages in respect of it(*ee*). And if such evidence is offered

competent to show by a witness that he understood the speaker to mean differently from what the words commonly import. Pitts *v.* Pace, 7 Jones, Law (N. C.), 558. And see Wright *v.* Paige, 36 Barb. 438; Barton *v.* Holmes, 16 Iowa, 252; Smith *v.* Gaffard, 33 Ala. 168; Jarnigan *v.* Fleming, 43 Miss. 710.

(*c*) Watson, B., Barnett *v.* Allen, 3 H. & N. 381; 27 Law J., Exch. 515.

(*d*) Cooke *v.* Hughes, Ry. & M. 115.

(*e*) Pearce *v.* Ornsby, 1 M. & Rob. 456. Carter *v.* M'Dowell, Wright, 100. Witcher *v.* Richmond, 3 Humph. 478.

(*ee*) Stitzell *v.* Reynolds, 67 Penn. St. 54. Taylor *v.* Moran, 4 Met. (Ky.) 127.

merely for the purpose of obtaining damages for such subsequent injury, it will be properly rejected(*f*). Defamatory statements, therefore, made by the defendant subsequently to the publication of the libel, are admissible in evidence merely to show malice(*ff*); but if any considerable distance of time has elapsed between the publication of the libel and the speaking of the words, they ought to be received with very great caution, as they may refer to something that has taken place between the plaintiff and the defendant subsequently to the libel, and may not, therefore, amount to any proof of malice at the time of the publication of the libel(*g*). And when such statements are given in evidence the defendant is entitled to get rid of the effect of them by proving the truth of the words(*h*).

1157 *Evidence of malice.*—To sustain an action for libel or slander, the plaintiff must show that it was malicious; but every unauthorized publication of defamatory matter is, in point of law, to be considered as malicious, and it is a question of law, whether the communication is authorized or not. If it be authorized, the legal presumption of malice arising from the unauthorized publication of defamatory matter fails, and the plaintiff, to sustain his action, must prove actual malice, or, as it is usually expressed, malice in fact(*i*). Whenever one man is proved to have used words imputing the commission of felony, or of any other indictable offence to another, he will be taken to have used them maliciously, unless he gives some sufficient excuse for using them, as in giving the character of a servant, making a charge to a constable, etc. The defendant's conduct in putting a justification on the record which he does not attempt to prove, and will not abandon, may be taken into consideration by a jury, as proving malice and

(*f*) Pearson *v.* Le Maitre, 5 M. & Gr. 720; 6 Sc. N. R. 607. Barwell *v.* Adkins, 1 M. & G. 808. Darby *v.* Ousley, 1 H. & N. 13. In Bassell *v.* Elmore, 48 N. Y. 561, it is said to be well settled that under a single count in the complaint, the plaintiff may show a repetition of the same slanderous charge even down to the trial, not for the purpose of sustaining the action, but for the purpose of showing the degree of malice, and thus enhancing the damages which the jury is authorized to award the plaintiff.

(*ff*) Stitzell *v.* Reynolds, 67 Penn. St. 54. Van Derveer *v.* Sutphin, 5 Ohio (N. S.), 293. Hesler *v.* Degant, 3 Ind. 501. State *v.* Riggs, 39 Conn. 498. Schrimper *v.* Heilman, 24 Iowa, 505. Kennedy *v.* Gifford, 19 Wend. 296. Smith *v.* Lovelace, 1 Duvall (Ky.), 215. Beardsley *v.* Bridgman, 17 Iowa, 290. Fry *v.* Bennett, 28 N. Y. 324. Norris *v.* Elliott, 39 Cal. 73. State *v.* Jeandell, 5 Harring. (Del.) 475. Robbins *v.* Fletcher, 101 Mass. 115. Morgan *v.* Livingston, 2 Rich. 573. Burson *v.* Edwards, 1 Smith (Ind.), 7. And see Titus *v.* Sumner, 44 N. Y. 266; Inman *v.* Fowler, 8 Wend. 602; Howard *v.* Sexton, 4 N. Y. 157; Adkins *v.* Williams, 26 Ga. 222; Taylor *v.* Kneeland, 1 Doug. 67; Markham *v.* Russell, 12 Allen, (Mass.), 573.

(*g*) Hemmings *v.* Gasson, Ell. Bl. & Ell. 346, 27 Law J., Q. B. 262.

(*h*) Warne *v.* Chadwell, 2 Stark. 457.

(*i*) Cresswell, J., Coxhead *v.* Richards, 2 C. B. 605. Simmons *v.* Holster, 13 Minn. 249. Sands *v.* Robison, 12 S. & M. 704. Byrket *v.* Monohon, 7 Blackf. 83. See Jarnigan *v.* Fleming, 43 Miss. 710; Pennington *v.* Meek, 46 Mo. 217.

aggravating the injury, and every other part of the defendant's conduct down to the time of the trial may be considered by the jury; for acts, although subsequent, may indicate the existence of motives at a former time(*k*).

1158 *Proof of injury to the plaintiff.*—If the tendency of the publication is injurious to the plaintiff, the law will presume that the defendant, by the act of publishing it, intended to produce the injury it was calculated to effect, and it is the duty of a judge, if he thinks the publication injurious to the plaintiff, to tell the jury it is a libel and actionable(*l*). Every person who publishes in writing matter injurious to the character of another, is considered in point of law to have intended the consequences resulting from his act(*m*).

1159 *Evidence of special damage.*—When proof of special damage is essential to the maintenance of the action(*ante*, p. 955), it must be proved as laid, and any substantial variance between the allegation and the proof will be ground of nonsuit. It must appear also to be the natural and necessary result of the speaking or publishing of the words, or it will fail to sustain the action. Where the plaintiff alleged that he had engaged Madame Mara to sing at his oratorio, and that the defendant published a libel concerning her, in consequence of which she was prevented from singing, from an apprehension of being hissed, whereby the plaintiff lost the benefit of her services, it was held that the injury complained of was too remote, and not to be connected with the cause assigned for it; that if the libel was injurious to Madame Mara she might have an action for it, but her refusing to perform might have proceeded from groundless apprehension or mere caprice, and not from the publication of the libel; and the plaintiff, therefore, was nonsuited(*n*). If there are two distinct causes of special damage, one proceeding from the act of the defendant and another from the act of a third party, and the special damage may have resulted from either, it will fail to support an action(*o*). If the declaration alleges a special

(*k*) Simpson *v.* Robinson, 12 Q. B. 513. Merrill *v.* Peaslee, 17 N. H. 540. Garrett *v.* Dickerson, 19 Md. 418.

(*l*) Haire *v.* Wilson, 9 B. & C. 645. See Baker *v.* Young, 44 Ill. 42; Commonwealth *v.* Odell, 3 Pittsb. (Pa.) 449.

(*m*) Fisher *v.* Clement, 10 B. & C. 475. Detroit Daily Post Co. *v.* McArthur, 16 Mich 447. Sanderson *v.* Caldwell, 45 N. Y. 398, 404. In an action for libel it is unnecessary for the plaintiff to prove affirmatively that he has sustained damage in consequence of the libellous publication. The law not only imputes malice to the defendant but presumes that damages have been sustained by the plaintiff in consequence of the unlawful act of the defendant. Sanderson *v.* Caldwell, 45 N. Y. 398.

(*n*) Ashley *v.* Harrison, 1 Esp. 48.

(*o*) Vicars *v* Wilcox, 8 East, 2. Stevens *v.* Hartwell, 11 Met. 542. Bassell *v.* Elmore, 48 N. Y. 561. Terwilliger *v.* Wands, 17 N. Y. 54. Fowles *v.* Bowen, 30 N. Y. 20

damage, that several named persons had ceased to have dealings with the plaintiff in the way of his trade, the persons themselves must be called to prove the fact(*p*).

1160 *Proof of the trade, or profession, or official character of the plaintiff.*—Where the libel imputes to the plaintiff misconduct in his practice of a physician or surgeon, or as an attorney, and does not call in question or deny his qualification to practise, it will not be necessary for him to do more than prove that he was acting in the particular professional capacity imputed to him at the time of the publication of the libel(*q*). But when the libel or slander imputes to a medical or legal practitioner that he is not properly qualified, and the professional qualification is denied, the plaintiff must be prepared to prove it, by producing his diploma or certificate(*r*), duly sealed or signed, and stamped, where a stamp is requisite(*s*). If the document is not admissible in evidence on its production under the Documentary Evidence Act(*t*) the signatures must be proved in the ordinary way.

1161 *Proof that the words were spoken concerning a tradesman or professional man in the way of his trade or profession.*—In order to recover damages for slanderous words spoken of a tradesman or professional man in his trade or profession, it must be shown how the words were connected with his profession. To impute immorality to a clerk of a gas company, to say that he "consorts with whores," is "a disgrace to the town," and "unfit to hold his situation," is not actionable, because they are not connected with his character and conduct as a clerk. He may be a very good clerk, well fitted for his duties, although he is scandalously immoral(*u*).

1162 *Evidence on the part of the defendant—Traverse of material allegations.*—If the libel contains a charge upon a man in the way of his trade or business, the allegation concerning such trade or business must, if traversed, be strictly proved as it is set forth in the declaration, and the defendant is at liberty to bring evidence to disprove it, notwithstanding the disproving of the allegation does in effect prove the truth of the libel. If the plaintiff in his declaration alleges that he was, at the time of the publication of the libel, the manufacturer of a partic-

(*p*) Tilk v. Parsons, 2 C. & P. 202. Tunnicliffe v. Moss, 3 C. & K. 83. See Dicken v. Shepherd, 22 Md. 399; Bassell v. Elmore, 48 N. Y. 561.

(*q*) Berryman v. Wise, 4 T. R. 366. Smith v. Taylor, 1 B. & P. N. R. 204. Rutherford v. Evans, 6 Bing. 451. Sanderson v. Caldwell, 45 N. Y. 398.

(*r*) As to apothecaries, see 14 & 15 Vict. c. 99, s. 8.

(*s*) See 33 & 34 Vict. c. 97, ss. 16, 17.

(*t*) 8 & 9 Vict. c. 113; *post*, ch. 21.

(*u*) Lumby v. Allday, 1 Cr. & Jerv. 301

ular article, which he supplied to his customers in the way of his trade, and the defendant traverses the allegation, and the plaintiff establishes a *prima facie* case, the defendant is entitled to prove that the plaintiff did not manufacture the particular article he pretended to make, but a composition of a very different description, although the evidence amounts to proof of the truth of the charge imputed by the libel, and there is no plea of justification on the record(*x*).

1163 *Proof of the truth of the charge or accusation.*—If the defendant can show that the defamatory charge or accusation made by him against the plaintiff is true in substance, he answers the claim for damages(*y*). But to enable him to give the truth in evidence, in answer to the action, there must be a plea of justification on the record(*z*). The truth is an answer to the action, not because it negatives the charge of malice (for a person may wrongfully or maliciously utter slanderous matter, though true), but because it shows that the plaintiff is not entitled to recover damages, for the law will not permit a man to recover damages in respect of an injury to character which he either does not, or ought not to, possess(*a*).

Where the defendant justifies words which impute a felony to the plaintiff, it is competent to him to go into proof of his justification, although the plaintiff has been tried and acquitted of the charge, the trial and acquittal being *res inter alios acta*(*b*). If the plaintiff has been tried and convicted, the conviction may be given in evidence in support of the plea of justification. If a man be adjudged by the sessions to be the father of a bastard child, the adjudication is an answer to any complaint made by him against any one for saying or publishing that he has had a bastard(*c*). When the plaintiff has not been actually convicted of the felony he must be tried by the jury on the plea of justification, in the same way as if he was on his trial upon an indictment for the offence in a criminal court; so that, if there is a

(*x*) Manning *v.* Clement, 7 Bing. 368.

(*y*) An inaccurate statement is not, therefore, necessarily libellous. See Alexander *v.* North-East. Rail. Co., 34 Law J., Q. B. 152. Rayne *v.* Taylor, 14 La. An. 416. Foss *v.* Hildreth, 10 Allen (Mass.), 76.

(*z*) O'Brien *v.* Bryant, 16 M. & W. 168. Edsall *v.* Russell, 5 Sc. N. R. 801. Jarnigan *v.* Fleming, 43 Miss. 710. Huson *v.* Dale, 19 Mich. 17. Barrows *v.* Carpenter, 1 Clifford, C. C. 204. McCampbell *v.* Thornburgh, 3 Head (Tenn.), 109. Haws *v.* Stanford, 4 Sneed (Tenn.), 520. Arrington *v.* Jones, 9 Port. 139. Henson *v.* Veatch, 1 Blackf. 369. As to an order for particulars of the matters relied on to prove the truth of the plea, see Jones *v.* Bewicke, L. R. 5 C. P. 32.

(*a*) Littledale, J., in M'Pherson *v.* Daniels, 10 B. & C. 272.

(*b*) England *v.* Bourke, 3 Esp. 80. Cook *v.* Field, ib. 134.

(*c*) Thornton *v.* Pickering, 1 Freem. 283. Webb *v.* Cook, Cro. Jac. 535. Rex *v.* Rislip, 1 Ld. Raym. 394. Jervis, C.J., Helshan *v.* Blackwood, 11 C. B. 128.

doubt of his guilt, the jury are bound to give him the benefit of the doubt(*d*).

If a person publishes a libel and then pleads a justification, the court will not assist him to obtain evidence in support of his plea(*e*).

1164 *The damages recoverable in actions for defamation* will materially depend upon the nature and character of the libel, the extent of its circulation, the position in life of the parties, and the surrounding circumstances of the case. Where an action was brought for slanderous words, imputing subornation of perjury to the plaintiff, and the defendant suffered judgment by default, and on the execution of a writ of inquiry of damages the plaintiff gave no evidence of any actual damage, but his counsel addressed the jury, who assessed the damages at 40*l.*, and the defendant then moved to set aside the inquisition on the ground that nominal damages only were recoverable in the absence of any proof of actual damage on the part of the plaintiff, it was held that the plaintiff was not bound to give any such evidence to support the inquisition(*f*). If the defendant had any ground to urge in mitigation of damages, he should have proved it before the sheriff's jury.

The jury may give to the plaintiff damages for the publication of

(*d*) Richards *v.* Turner, Car. & M. 417.

(*e*) Metrop. Saloon Omnibus Co. *v.* Hawkins, 4 H. & N. 151.

(*f*) Tripp *v.* Thomas, 3 B. & C. 427. In an action for libel no express damages need be proved unless charged as expressly arising from the profession or occupation of the plaintiff. Price *v.* Whitely, 50 Mo. 439.

And where the publication is libellous *per se*, without reference to the business of the plaintiff, he may recover, in addition to the damages which the law presumes to have resulted to him from the wrongful act of the defendant, the damages resulting to him in his profession or business, without specific proof of such damage, if by extrinsic evidence, the plaintiff can connect the libellous words with his professional character. Sanderson *v.* Caldwell, 45 N. Y. 398.

The plaintiff is entitled to recover, in an action for libel, compensation for such damages as the jury may find he sustained as the direct consequence of the publication; and if the jury should find from the evidence that the publication proceeded from express malice or ill will to the plaintiff, they may award to him such exemplary or punitive damages as they may think the facts justify. Snyder *v.* Fulton, 34 Md. 128. Cramer *v.* Noonan, 4 Wis. 231. Kinney *v.* Hosea, 3 Harring. 397.

The plaintiff's family and position in life are always important circumstances as bearing upon the question of damages. Klumph *v.* Dunn, 66 Pa. St. 141. But that the plaintiff's rank in society is *not* admissible on the question of damages, see Gandy *v.* Humphries, 35 Ala. 617. And the jury may also take into consideration the wealth of the defendant. Humphries *v.* Parker, 52 Me. 502. Karney *v.* Paisley, 13 Iowa, 89. Hosley *v.* Brooks, 20 Ill. 115. Buckley *v.* Knapp, 48 Mo. 152. But see Palmer *v.* Haskins, 28 Barb. 90; Case *v.* Marks, 20 Conn. 248.

If the defendant is the proprietor of a newspaper in which a libel was published, the damages must be regulated by his general conduct as publisher, and the character and position of his paper. Detroit Daily Post *v.* McArthur, 16 Mich. 447.

For the purpose of showing the extent of the circulation of the libel, it is competent for the plaintiff to prove the extent of the circulation of the paper at the time the libel was published. Fry *v.* Bennett, 28 N. Y. 324.

And in estimating the damages in actions for slander and libel, the jury should consider the probable future as well as the actual past. True *v.* Plumley, 36 Me. 466.

the libel and for the mental suffering arising from the apprehension of the consequences of the publication(*g*). The damages are almost altogether in the discretion of the jury(*h*). The court will not interfere with them unless they are shown to be manifestly outrageous and extravagant(*i*).

1165 *Evidence in aggravation of damages* cannot, as we have seen, be given, if it establishes another cause of action against the defendant (*ante*, p. 987); for, if that were permitted, the jury would be giving damages for a second libel in an action for the first(*k*). Although a plea of justification, imputing felony to the plaintiff is abandoned at the trial and apologized for, still the putting of such a plea upon the record and failing to prove it is evidence of malice, and a great aggravation of the defendant's conduct, as showing an animus of persevering in the charge to the very last. The putting of such a plea upon the record, therefore, is a matter proper to be taken into account by the jury in estimating the amount of damages(*l*).

1166 *Mitigation of damages.*—A defendant is not now allowed to give evidence of the truth of the defamatory charge or statement in mitigation of damages(*m*), but must if he wishes to rely upon it in any way,

(*g*) Goslin *v.* Corry, 8 Sc. N. R. 25. This rule of damages is not applicable to editors of rival newspapers who have voluntarily and mutually engaged in publishing libellous matter concerning each other. Pugh *v.* McCarty, 40 Ga. 444.

(*h*) Kelly *v.* Sherlock, L. R., 1 Q. B. 686, where the jury gave a farthing under the circumstances of the case, although the libels were gross and offensive, and had been frequently repeated. Forsdyke *v.* Stone, L. R., 3 C. P. 607, *acc.* Trabue *v.* Mays, 3 Dana, 138.. Davis *v.* Davis, 2 N. & M. 81.

(*i*) Gilbert *v.* Burtenshaw, Cowp. 220. Highmore *v.* Earl of Harrington, 3 C. B., N. S. 142. Harrison *v.* Pearce, 32 Law T. R. 298. Root *v.* King, 7 Cow. 613. Douglass *v.* Tousey, 2 Wend. 352. Riley *v.* Nugent, 1 A. K. Marsh. 431.

(*k*) Finnerty *v.* Tipper, 2 Campb. 74.

(*l*) Warwick *v.* Foulkes, 12 M. & W. 508. Richardson *v.* Roberts, 23 Ga. 215. Pool *v.* Devers, 30 Ala. 672. Gorman *v.* Sutton, 32 Penn. St. 247. Robinson *v.* Drummond, 24 Ala. 174. Wilson *v.* Nations, 5 Yerg. 211. Lee *v.* Robertson, 1 Stew. 138. Jackson *v.* Stetson, 15 Mass. 48. Alderman *v.* French, 1 Pick. 1. But see Pallet *v.* Sargent, 36 N. H. 496; Sloan *v.* Petrie, 15 Ill. 425; Shank *v.* Case, 1 Carter (Ind.), 164; Murphy *v.* Stout, ib. 372; Shoulty *v.* Miller, ib. 544; Swails *v.* Butcher, 2 ib. 84; Beasley *v.* Meigs, 16 Ill. 139; Spencer *v.* McMasters, ib. 405; Klinck *v.* Colby, 46 N. Y. 427; Spooner *v.* Keeler, 51 ib. 527, 533.

(*m*) Underwood *v.* Parks, 2 Str. 1200. It is provided by the New York Code of Procedure that in actions for libel or slander, "the defendant may, in his answer, allege both the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of damages; and whether he prove the justification or not he may give in evidence the mitigating circumstances." Code, s. 165.

Prior to the adoption of the Code, the defence of an action for slander or libel was a very perilous undertaking. If the defendant attempted to justify by proving the truth of the words spoken, it was regarded as a reiteration of the charge and conclusive evidence of malice, and no evidence in mitigation could be received. If he failed to establish the truth of the charge, the damages were aggravated. He might give evidence in mitigation, but in that case he must admit the truth of the charge, and could give no evidence tending to prove the contrary. He could only give evidence to show that he had reason to believe the charge was true when made. This evil was remedied by the section of the Code above quoted, as construed by the court of last resort. Spooner *v.* Keeler, 51 N. Y. 527. Bush *v.* Prosser, 11

put a plea of justification on the record (*ante*, p. 990). But where the plaintiff, by his declaration, alleges that before the publication of the

ib. 347. Bisbey v. Shaw, 12 ib. 67. Wachter v. Quenzer, 29 ib. 547. And see Bennett v. Matthews, 67 Barb. 410. As to the mode of pleading double defences, see Fink v. Justh, 14 Abb. (N. Y.) Pr. N. S. 107.

In Missouri, also, the defendant in an action for libel is permitted to allege both the truth of the matter charged as defamatory and any circumstances in mitigation. Wagn. Mo. Stat. 1021, s. 44.

In Indiana the defendant may set forth in his answer as many grounds of defence, etc., as he shall have, and may in one paragraph of his answer deny the speaking of the words, and in another paragraph admit the speaking and justify them upon the ground that they were true. 2 Gav. & H. 88. Weston v. Lumley, 33 Ind. 486. A similar rule of pleading has been enacted in Kentucky. Horton v. Banner, 6 Bush, 596.

In Mississippi the defendant, under a plea of the general issue, may offer evidence in mitigation of damages, but cannot, under that plea, give evidence of the truth of the statements charged to be slanderous. Jarnigan v. Fleming, 43 Miss. 710.

In Michigan the defendant, under such plea, may offer evidence, for the sole purpose of rebutting malice and mitigating damages, that at the time he utterred the words complained of, he had reason to believe that they were true. But such evidence is admissible for that purpose only; and if the defendant relies on the truth of the charge as a defence, he must interpose a plea of justification. Huson v. Dale, 19 Mich. 17.

So in Vermont, the defendant, under the general issue, may give in evidence for the purpose of mitigating damages, any facts tending to show that the slanderous words were spoken in good faith and in a belief of their truth But such facts are not admissible for such purpose, under such plea, if they amount to proof of the actual truth of the words spoken. Hutchinson v. Wheeler, 35 Vt. 330.

In Connecticut the defendant is not allowed to prove the truth of the words charged for the purpose of mitigating damages, but he is allowed to show mitigating circumstances which tend to prove the truth of the charge, but do not necessarily imply such truth, nor necessarily constitute evidence of it. Swift v. Dickerman, 31 Conn. 285. This is also the rule in Alabama. Scott v. McKinnish, 15 Ala. 662.

In Ohio the defendant, under the general issue, for the purpose of mitigating damages and to rebut the presumption of express malice, may give evidence of facts tending to prove the truth of the matter alleged as defamatory. Van Derveer v. Sutphin, 5 Ohio (N. S.), 293.

In Indiana matters in mitigation of damages cannot be put in evidence under a general denial. Blickenstaff v. Perrin, 27 Ind. 527.

In Maine the defendant cannot, under the general issue, give the truth in evidence either as a defence to the suit or in mitigation of damages. Taylor v. Robinson, 29 Me. 323.

In Pennsylvania the defendant cannot prove circumstances which led him to utter the words complained of, if they tend to prove the truth of the charge without amounting to a justification. Porter v. Botkins, 59 Penn. St. 484. Smith v. Smith, 39 ib. 441. Updegrove v. Zimmerman, 13 ib. 619.

The defendant may show, also, in mitigation of damages, that when the words were spoken, he was drunk. Howell v. Howell, 10 Ired. 84. To the contrary, see M'Kee v. Ingalls, 4 Scam. 30.

Or insane, or that his mind was so besotted by a long course of dissipation, and his character so depraved that no one who knew him would pay any attention to what he might say, or give any credence to any slanderous charge he might make. Gates v. Meredith, 7 Ind. 440.

But evidence that the defendant was in the habit of talking about persons and things, and that his sayings were not regarded by the community as worthy of notice, and seldom occasioned remark, has been held inadmissible in mitigation of damages. Howe v. Perry, 15 Pick. 506.

The fact that slanderous words were spoken through the heat of passion, or under excitement produced by the immediate provocation of the plaintiff may be shown in mitigation of damages. McClintock v. Crick, 4 Iowa, 453. Brown v. Brooks, 3 Ind. 518. Miles v. Harrington, 8 Kan. 425. Mousler v. Harding, 33 Ind. 176. Freeman v. Tinsley, 50 Ill. 497. Powers v. Presgraves, 38 Miss. 227. Rauger v. Goodrich, 17 Wis. 78. Duncan v. Brown, 15 B. Mon (Ky.) 186. Steever v. Beehler, 1 Miles, 146.

But evidence of a provocation given by the plaintiff at any considerable time previous to the speaking of the slanderous words is not admissible in mitigation of damages. Sheffill v. Van Deusen, 15 Gray (Mass.) 485.

libel he had always preserved a good character and position in society, from which he has been driven by the insinuations in the libel, and claims damages accordingly, evidence is admissible to show that, prior to the publication of the libel, the plaintiff's character was so bad, that he was universally avoided and shunned(*n*); for whenever a person claims damages on the ground of disparagement to his character, it may be shown by evidence that his character was blemished prior to the utterance of the slander of which he complains(*o*).

Evidence of this sort must, however, be used with extreme caution, or it will tend to the aggravation rather than the mitigation of the damages. If the circumstances amount to a justification of the libel, they are not then receivable in mitigation of damages, as they should have been pleaded by way of justification if the defendant meant to rely upon them(*p*). In some cases, general evidence of the plaintiff's bad character has been held to be inadmissible in mitigation of damages(*q*). In other cases, the defendant has been allowed to prove, by

(*n*) Leicester (Earl of) *v.* Walter, 2 Campb. 251. In an action of slander, the plaintiff cannot, under the general issue, introduce evidence in chief of his good character. Such evidence is inadmissible except to rebut evidence of bad character offered by the defendant. Martin *v.* Hooker, 7 Coldw. (Tenn.) 130. Wright *v.* Schroeder, 2 Curtis C. C. 548. Dame v. Kinney, 5 Foster (N. H.), 318. Severance *v.* Hilton, 4 ib. 147. M'Cabe *v.* Platter, 6 Blackf. 405. This is not, however, the rule in South Carolina. Williams *v.* Haig, 3 Rich. 362.

In an action to recover damages arising from a charge of perjury, the defendant may show the general bad character of the plaintiff for truth, in mitigation of damages. Moyer *v.* Moyer, 49 Penn. St. 210. McNutt *v.* Young, 8 Leigh, 542. But see Steinman *v.* McWilliams, 6 Barr. 170.

And in an action for slanderous words imputing a want of chastity to the plaintiff, evidence of her bad reputation in this respect is admissible for the same purpose. Fletcher *v.* Burroughs, 10 Iowa, 557. Conroe *v.* Conroe, 47 Penn. St. 198. Parkhurst *v.* Ketchum, 6 Allen (Mass.), 406. Bridgman *v.* Hopkins, 34 Vt. 532. Case *v.* Marks, 20 Conn. 248. Scott *v.* McKinnish, 15 Ala. 662. M'Cabe *v.* Platter, 6 Blackf. 405.

So in an action for words spoken charging larceny, the defendant may prove in mitigation of damages, that before the speaking of the words complained of, the plaintiff's general character for honesty was bad. Fuller *v.* Dean, 31 Ala. 654. Eastland *v.* Caldwell, 2 Bibb, 21.

And in general the defendant, in an action of slander, may, for the purpose of reducing damages, show that the plaintiff's general character is bad. Lamos *v.* Snell, 6 N. H. 413. Sawyer *v.* Eifert, 2 N. & M. 511. Paddock *v.* Salisbury, 2 Cow. 811. Eastland *v.* Caldwell, 2 Bibb. 21. Anthony *v.* Stephens, 1 Mo. 254. Stone *v.* Varney. 7 Met. 86.

Nor is the evidence in relation to the general character of the plaintiff confined to the subject-matter of the slander. Lamos *v.* Snell, 6 N. H. 413. Sawyer *v.* Eifert 2 N. & M. 511. Sayre *v.* Sayre, 1 Dutch. (N. J.) 235.

But evidence of particular facts tending to show that the plaintiff's character was bad is not admissible in mitigation of damages. Lamos *v.* Snell, 6 N. H. 413. Sawyer *v.* Eifert, 2 N. & M. 511. Swift v. Dickerman, 31 Conn. 285. Parkhurst *v.* Ketchum, 6 Allen (Mass.), 406. Sheahan *v.* Collins, 20 Ill. 325. Burke *v.* Miller, 6 Blackf. 155.

Where the defendant charged that the plaintiff committed an offence with one person, he will not be allowed to show, in mitigation of damages, that the plaintiff committed a like offence with other persons. Pallet *v.* Sargent, 36 N. H. 496.

Nor can the defendant introduce evidence of what two or three persons have said in relation to the character of the plaintiff. Regnier *v.* Cabott, 2 Gillmann, 34.

(*o*) Lord Ellenborough, C.J., —— *v.* Moor, 1 M. & S. 286.

(*p*) Watson *v.* Christie, 2 B. & P. 224; *post*, ch. 23, s. 1.

(*q*) Jones *v.* Stevens, 11 Pr. 235. Sayre *v.* Sayre, 1 Dutch. (N. J.) 235. Smith *v.* Smith, 8

cross-examination of the plaintiff's witnesses, that rumors and reports of the same tenor as the libel were current prior to the publication of the libel, and were the common topics of conversation(*r*). Rumors current *after* the utterance of slander, cannot, of course, help the defence, as they are the natural result of the dissemination of the slander, and tend only to aggravate the damages(*s*).

It is no ground for mitigation of damages that the defendant, at the time he uttered the slander, stated that he heard it from another person, naming such person(*t*).

1167 *Proof of libels by the plaintiff on the defendant.*—"If a man is in the habit of libelling others, he complains," observes Sir James Mansfield, "with a very bad grace of being libelled himself; and if two men are concerned in publishing monstrous libels against each other every day, there can be no claim to damages on either side"(*u*). But the defendant cannot give in evidence, in mitigation of damages, other libels published by the plaintiff concerning him, unless the defendant can show that the libels proceeding from the plaintiff were connected with the libels proceeding from the defendant, for one libel cannot be set off against another, unless it can be shown that they are connected together, and that the libel published by the plaintiff provoked the libel published by the defendant, and that the plaintiff is himself, to a certain extent, the cause of the injury for which he claims compensation in damages(*v*). When the object is to show that the defendant was provoked, by libels published against him by the plaintiff, to retaliate by publishing the libel of which the plaintiff complains, it is essential to prove that the plaintiff's libels came to the defendant's knowledge before he published his libel(*x*). When the libel is published concerning persons not parties to the record, it cannot be read in evidence in mitigation of damages(*y*).

1168 *Evidence of offers of apology in mitigation of damages.*—By 6 & 7 Vict. c. 96, s. 1, it is enacted, that in any action for defamation it shall be lawful for the defendant (after notice in writing of his intention, given

Ired. 29. Pope *v.* Welsh, 18 Ala. 631. Burke *v.* Miller, 6 Blackf. 155. Lamos *v.* Snell, 6 N. H. 413. Sawyer *v.* Eifert, 2 N. & M. 511. Eastland *v.* Caldwell, 2 Bibb, 21.

(*r*) Wyatt *v.* Gore, Holt, N. P. C. 306. Richards *v.* Richards, 2 M. & Rob. 557. See Wetherbee *v.* Marsh, 20 N. H. 561; Van Derveer *v.* Sutphin, 5 Ohio (N. S.) 293. But see Scott *v.* McKinnish, 15 Ala. 662; Young *v.* Bennett, 4 Scam. 43; Sanders *v.* Johnson, 6 Blackf. 30; Mapes *v.* Weeks, 4 Wend. 659; Anthony *v.* Stephens, 1 Mo. 254; Matson *v.* Buck, 5 Cow. 499.

(*s*) Thompson *v.* Nye, 20 Law J., Q. B. 85; 16 Q. B. 175. Scott *v.* McKinnish, 15 Ala. 662.

(*t*) Bennett *v.* Bennett, 6 C. & P. 588. See *ante*, p. 980. Treat *v.* Browning, 4 Conn. 408.

(*u*) Finnerty *v.* Tipper, 2 Campb. 72. But see Pugh *v.* McCarty, 40 Ga. 444.

(*v*) May *v.* Brown, 3 B. & C. 126. Tarpley *v.* Blabey, 2 B. N. C. 441.

(*x*) Watts *v.* Fraser, 7 Ad. & E. 232.

(*y*) See Forshee *v.* Abrams, 2 Clarke (Iowa), 571.

to the plaintiff at the time of filing or delivering the plea in such action), to give in evidence, in mitigation of damages, that he made or offered an apology to the plaintiff for such defamation before the commencement of the action, or as soon afterwards as he had an opportunity, in case the action was commenced before there was an opportunity of offering an apology. (See *ante*, p. 977).

1169 *Of the judge's direction to the jury.*—The 32 Geo. 3, c. 60, s. 1, enacts, that on trials for libel the jury may give a general verdict of guilty or not guilty, upon the whole matter put in issue, and shall not be required or directed by the court or judge to find the defendant guilty merely on the proof of the publication by the defendant of the paper charged to be a libel, and of the sense ascribed to the same. Also (s. 2) that the judge shall, according to his discretion, give his opinion and directions to the jury on the matter in issue(*z*), who may (s. 3) find a special verdict. The usual course in cases of libel since the passing of this statute is, first to give a legal definition of the offence, and then to leave it to the jury to say whether the facts necessary to constitute that offence are proved to their satisfaction, and that, whether the libel is the subject of a criminal prosecution or a civil action. The judge, as a matter of advice to them in deciding the question, may give his own opinion as to the nature of the publication, but is not bound to do so as a matter of law(*a*). "The cases," observes Lord Denman, "show that a judge must not leave the fact of the defendant's intention as a question for the jury(*b*), except so far as the intention may be shown by the tendency of the publication itself. A man may wilfully publish a mischievous libel without intending to injure the party, and may be responsible. He may, indeed, in effect, do him no harm by the publication; for it may be that blame from some quarters is more valuable than praise. Yet he must answer for such a publication"(*c*).

It is the duty of the judge to say whether a publication is capable of the meaning ascribed to it; but when the judge is satisfied of that, it must be left to the jury to say whether the publication has that meaning or not(*d*).

(*z*) Baylis *v.* Lawrence, 11 Ad. & E. 924.

(*a*) Parmiter *v.* Coupland, 6 M. & W. 108. Rex *v.* Watson, 2 T. R. 206. In civil cases the court is bound to instruct the jury as to whether the publication is libellous, supposing the inuendoes to be true; and a verdict contrary to such instructions will be set aside. Pittock *v.* O'Niell, 63 Pa. St. 253.

(*b*) Haire *v.* Wilson, 9 B. & C. 645.

(*c*) Baylis *v.* Lawrence, 11 Ad. & E. 924.

(*d*) Sturt *v.* Blagg, 10 Q. B. 908.

Where the defendant sets up as a defence that the communication was a privileged communication, but the judge holds that there are comments by the defendant in excess of the privilege, the judge is not thereby justified in telling the jury that the defendant, by exceeding his privilege, has been guilty of a libel, for whenever there is evidence of malice, either extrinsic or intrinsic, in answer to the immunity claimed by reason of the occasion, a question arises which the jury, and the jury alone, ought to determine. Whenever there are expressions in a publication which may reasonably be contended to prove malice, the plaintiff has a right to have the whole matter submitted to the jury, for them to say whether, in writing and publishing it, the defendant was acting *bonâ fide* or maliciously(*e*). But if words used in a privileged communication are capable of two interpretations, one compatible with, the other incompatible with, the absence of malice, the former interpretation, it seems, should be allowed to prevail(*f*).

1170 *Setting aside verdict—Arrest of judgment.*—If the publication is, on the face of it, libellous, and the jury, nevertheless, find their verdict for the defendant, the verdict may be set aside, and a new trial obtained(*g*). If the judge and jury think the publication libellous, still if on the record it appears not to be so, judgment must be arrested(*h*). If an action be brought for speaking slanderous words all at one time—that is, all in one count—and there is a verdict for the plaintiff, though some of the words will not maintain the action, yet if any of the words will, the damages may be given generally; for it shall be intended that the damages were given for the words which are actionable, and that the others were inserted only for aggravation. But if the action be brought for several slanders spoken at several times, and the action will not lie for the words spoken at one time, but will lie for the words spoken at another, and a verdict be found for all the words, and entire damages given, the judgment will, it seems, be arrested(*i*). If the words appear, upon the face of the declaration, to have been spoken at one time, the whole may be considered as one count, containing words actionable and not actionable, and the verdict will stand upon those which are actionable(*k*).

(*e*) Cooke *v.* Wildes, 5 Ell. & Bl. 342; 25 Law J., Q. B. 367; Stace *v.* Griffith, L. R., 2 P. C. Ca. 420. See White *v.* Carroll, 42 N. Y. 161.
(*f*) Spill *v.* Maule, 38 Law J., Exch. 138.
(*g*) Parmiter *v.* Coupland, 6 M. & W. 105.
(*h*) Hearne *v.* Stowell, 12 Ad. & E. 731. Goldstein *v.* Foss, 6 B. & C. 159. Solomon *v.* Lawson, 8 Q. B. 837.
(*i*) Griffiths *v.* Lewis, 8 Q. B. 852.
(*k*) Alfred *v.* Farlow, ib. 863.

1171 *Indictments for libel and slander.*—Malicious defamation either in printing or writing, or by signs and pictures, and, in certain cases, by word of mouth, has always been considered an indictable offence at common law(*l*), as tending to promote strife, and quarrels, and breaches of the peace by inciting persons to revenge themselves for the affront, or for the preservation of their good name. A libel upon a magistrate or public officer in the execution of his public duty, has also always been considered a great public offence, as it tends to bring the administration of justice and the government itself into contempt.

Although the person libelled be dead at the time of the publication of the libel, yet it is punishable if its tendency is to stir up others of the same family or society to break the peace in vindication of the memory of the deceased, or if it be a libel upon a magistrate or public officer(*m*).

A person may be indicted and punished criminally, not only for the publication of scandalous writings, but also for singing libellous songs and poems directly tending to a breach of the peace, and for holding up persons to shame and ignominy by ridiculous and degrading pictures and prints, or by reproachful or ignominious signs, such as fixing up a gallows over a man's door(*n*).

A person may be convicted, also, of a misdemeanor for publishing a libel upon a class of persons, such as the clergy of a particular diocese, or the residents of a particular locality, if the direct tendency of the publication is to stir up riot and disorder, and incite to a breach of the peace(*o*).

When a person, either by writing, or by publications in print, or by any other means, calumniates the proceedings of a court of justice, he renders himself liable to an indictment for a misdemeanor(*p*); but the propriety of a verdict, or the correctness of the decisions of a judge, may be canvassed and controverted, provided it be done with fairness and candor, and temperate reasoning and argument, published with a view to elucidate the truth, and not to bring the administration of justice into hatred and contempt(*q*).

The composing and writing of a libel, with a view to its publication, is in itself a misdemeanor, triable in the county where the libel

(*l*) Hawkins' Pleas of the Crown, ch. 73; 3 Inst. 174; Bract. lib. 3, c. 36.
(*m*) De Libellis Famosis, 5 Co. 254. Rex v. Topham, 4 T. R. 194.
(*n*) De Libellis Famosis, *ut sup.*
(*o*) Rex v. Williams, 5 B. & Ald. 595. Rex v. Osborne, 2 Barnard, 138, 166. Anon., 2 Swanst. 503, n.
(*p*) Rex v. Watson, 2 T. R. 199.
(*q*) Rex v. White, 1 Campb. 359.

was composed and published, though the publication afterwards takes place in a different county. If, therefore, a libel be written in one county and published in another, the libeller may be prosecuted in either county(*r*).

Upon an indictment, as well as in an action, there is a great distinction between slander by word of mouth, and slander in a published writing. As regards slanderous writings, it is said that wherever an action will lie for composing or publishing them, without alleging any special damage, an indictment may also be maintained(*s*); but an indictment cannot be supported for mere verbal slander, unless it is seditious or blasphemous, or directly tending to a breach of the peace, or is uttered respecting a magistrate in the execution of his office(*t*). Thus, where it was said of an alderman, "When he puts on his gown Satan enters into it," and of a mayor, "You are a forsworn mayor, and have broke your oath," also, "You, Mr. Mayor, are a rogue and a rascal," it was held that these were but loose, unmannerly words, not punishable criminally by indictment(*u*).

The 6 & 7 Vict. c. 96, ss. 4, 5, makes a distinction in respect of punishment between persons who maliciously publish defamatory libels, knowing them to be false, and those who publish them without having any knowledge one way or the other on the subject.

1172 *When the truth of the matter may be given in evidence.*—Formerly, in all cases of indictment or information for the public or criminal offence of libel, it was immaterial whether the libel was true or false, or whether the person libelled was of good or ill fame(*x*). But now, by 6 & 7 Vict. c. 96, s. 6, it is enacted, that on the trial of any indictment or information for a defamatory libel, the defendant, having pleaded such plea as in the statute mentioned, may have the truth of the libel inquired into, but that the truth of it shall not amount to a defence, unless it was for the public benefit that the matters charged as libellous should be published.

In an information for a seditious libel, the production of the *London Gazette*, stating that certain addresses had been presented to the Crown, is sufficient evidence of the fact(*y*).

1173 *Evidence for the defence.*—If, upon the trial of any indictment or information for libel, evidence is given establishing a presumptive case

(*r*) Rex v. Burdett, 4 B. & Ald. 95.
(*s*) Archb. Crim. Plead., 16th ed., 899, 900.
(*t*) Rex v. Weltye, 2 Campb. 142. R. v. Langley, 2 Salk. 697. R. v. Wrightson, ibid.
(*u*) Reg. v. Langley, 6 Mod. 125. Rex v. Pocock, 2 Str. 1158. See *ante*, p. 956.
(*x*) See De Libellis Famosis, 5 Co. 254.
(*y*) R. v. Holt, 5 T. R. 436.

of publication against the defendant by the act of any other person by his authority, it is competent to the defendant to prove that the publication was made without the defendant's authority, consent, or knowledge, and that the publication did not arise from want of due care or caution on his part.

The public offence of libel against a private individual, being only a misdemeanor, does not in anywise suspend or interfere with the right of action for damages(*z*).

It is not competent to a defendant charged with the publication of a seditious libel to prove that similar libels had been previously published by other persons who had not been prosecuted for it(*a*).

(*z*) See *ante*, pp. 41, 42.

(*a*) R. v. Holt, *supra*.

CHAPTER XVIII.

OF FRAUDULENT MISREPRESENTATION AND DECEIT, FRAUDULENT CONCEALMENT, BREACH OF WARRANTY AND FALSE PRETENCES.

SECTION I.—*Of fraudulent misrepresentation and deceit, fraudulent concealment, breach of warranty, and false pretences.*—Wilful or unintentional deceit—Representations by a person of a particular fact when he knows that he has no knowledge at all about it—Statements and representations which must be authenticated by a signed writing—False representations concerning the conduct, credit, ability, trade, or dealings of co-partnerships and joint-stock companies—Misrepresentation by directors—Publication of deceitful prospectuses and reports—Fraudulent breach of warranty—Proof of warranty—Private representations—False representations amounting to a warranty—Representations concerning matters which lie as much within the knowledge of one party as the other—Representations amounting merely to expressions of opinion and belief—Statements in answer to inquiries—Warranties by vendors—False representations of title—False representations by vendors and manufacturers of the character and quality of the articles they manufacture and sell—Sale of goods by sample—False representations by railway companies—Deceit by agents—False assumption of authority—Counterfeiting trade-marks—Warranty of articles sold with trade-marks upon them—Fraudulent assumption of the name of a bank—Deceit by provision-dealers—False and fraudulent representations by married women and infants—Fraudulent concealment on sales of chattels—Fraudulent concealment of the dangerous nature of articles delivered to a bailee to be warehoused or carried—Fraudulent sales with all faults and without allowance for any defect, error, or mis-statement.

SECTION II.—*Of actions for fraud and deceit—Remedy by indictment and injunction*—Parties, pleadings, defences, and evidence—Proof of fraudulent warranties on sales of horses—Proof of unsoundness—Damages recoverable—Indictments for obtaining money or goods by false pretences, and for the fraudulent use of trade-marks—Injunction to prevent fraud, and the fraudulent use of trade-marks, names, etc.

SECTION I.

OF FRAUDULENT MISREPRESENTATION AND DECEIT; FRAUDULENT CONCEALMENT AND BREACH OF WARRANTY.

1174 *Of wilful deceit.*—An action cannot be supported for the telling a bare, naked lie, *i.e.*, saying a thing which is false, knowing or not knowing it to be so, and without any design to impose upon or cheat another, and without any intention that another should rely upon the false statement, and act upon it(*a*); but if a falshood be knowingly told, with an intention that another person should believe it to be true, and act upon it, and that person does act upon it, and thereby suffers damage, the party telling the falsehood is responsible in damages in an action for deceit, there being a conjunction of wrong and loss, entitling the injured person to compensation(*b*). Where a gun had been delivered by the defendant to the plaintiff for the purpose of being used by him, with an accompanying representation that he might safely use it, and that representation was false to the defendant's knowledge, and the plaintiff, acting upon the faith of its being true, used the gun, and received damage thereby, it was held that he was entitled to recover compensation for the injury from the defendant(*c*).

If a defendant has made a false representation knowing it to be false, with intent to induce, and has thereby induced, the plaintiff to enter into a contract into which, but for that misrepresentation, he would not have entered, and the plaintiff has been damnified by the falsehood, a case of fraud is made out, and an action for damages is maintainable(*d*). But if it be a contract made with the defendant, the plaintiff, on discovering the fraud, should at once repudiate the contract; for, where the plaintiff engaged to convey away certain rubbish for a certain price under a false representation by the defendant as to the amount of rubbish to be moved, it was held, that, having

(*a*) Behn *v.* Kemble, 7 C. B., N. S. 260.

(*b*) Com. Dig. Action upon the case. DECEIPT. A. 9, A. 10. Parke, B., Watson *v.* Poulson, 15 Jur. 1112. Eames *v.* Morgan, 37 Ill. 260. Hubbard *v.* Briggs, 31 N. Y. 518. Howard *v.* Gould, 28 Vt. 524. Chester *v.* Comstock, 40 N. Y. 575.

Fraud is not actionable unless it causes damage. Nye *v.* Merriam, 35 Vt. 488. Castleman *v.* Griffin, 13 Wis. 537. "Dolus malus est omnis machinatio, calliditas, fallacia, ad circumveniendum, fallendum, decipiendum aliquem adhibita"—Dig. lib. 4, tit. 3, lex. 1, s. 2.

(*c*) Langridge *v.* Levy, 2 M. & W. 530; 4 M. & W. 337. Farrant *v.* Barnes, 11 C. B., N. S. 553; 31 Law J., C. P. 139. Barry *v.* Croskey, 2 Johns. & H. 21.

(*d*) Canham *v.* Barry, 15 C. B. 620. Holmes *v.* Clark, 10 Iowa, 423. Courteney *v.* Carr, 11 Iowa, 295.

knowledge of the fraud before the work was finished, he was not at liberty to finish the work and then sue for more than the stipulated price. He ought to have repudiated the contract at once(*e*). It is not necessary in all cases to show that the defendant knew the representation to be untrue; for if he made the statement for a fraudulent purpose, and without believing it to be true, and with the intention of inducing the plaintiff to do an act, and the plaintiff does the act to his own prejudice, an action for damages is maintainable(*f*).

1175 *Unintentional deception.*—But a person who has reason to believe, and actually believes, a particular fact to be true, and accordingly represents what he believes, is not liable to an action merely because it turns out that he was mistaken, and that his representation was unintentionally false(*g*); for, if every untrue statement which produces damage to another would found an action at law, a man might sue his neighbor for any mode of communicating erroneous information, such (for example) as having a conspicuous clock to slow, whereby the plaintiff was induced to neglect some important duty; but if it be shown that the defendant was under any legal obligation to state the truth correctly to the plaintiff, there would be a legal grievance in misleading him, for which an action would lie; still more so, if he made the false representation with a view to some unfair advantage to himself(*h*).

In order to maintain an action for deceit, or for a false and fraudulent representation, it is not necessary to prove that the false representation was made from a corrupt motive of gain to the defendant, or a wicked motive of injury to the plaintiff; it is enough if a representation is made which the person making it knows to be untrue, and which is intended or calculated to induce another to act on the faith of it in such a way as that he may incur damage, and that damage is actually incurred. A wilful falsehood of such a nature is, in the legal

(*e*) Selway *v.* Fogg, 5 M. & W. 86.

(*f*) Taylor *v.* Ashton, 11 M. & W. 415. See Foster *v.* Kennedy's Adm'r, 38 Ala. 359.

(*g*) Collins *v.* Evans, 5 Q. B. 826. Ormrod *v.* Huth, 14 M. & W. 664. Childers *v.* Wooler, 29 Law J., Q. B 129. Where a statement is made in the honest belief of its truth, and such belief has resulted from a mistake fallen into without fault, fraud cannot be imputed, although injury has thereby resulted to another person. Neither damage or fraud singly gives a right of action. Both must concur; and a party cannot be held liable for damages for making fraudulent representations while entirely free from any intention to deceive in any respect. Marsh *v.* Falker, 40 N. Y. 562. Weed *v.* Case, 55 Barb. 534. But see Bankhead *v.* Alloway, 6 Coldw. (Tenn.), 56.

Misrepresentation of a material fact, whether intentionally or by mistake, is a legal fraud if it actually deceives. Terhune *v.* Dever, 36 Ga. 648. Frenzel *v.* Miller, 37 Ind. 1. Elder *v.* Allison, 45 Ga. 13.

(*h*) Barley *v* Walford, 9 Q. B. 208.

sense of the word, a fraud(*i*). Whether the defendant has any interest in the assertion he makes, or in the matter respecting which it is made, is perfectly immaterial(*k*). And whether the representation be made to the plaintiff, or a third party, is immaterial, if it is false to the knowledge of the defendant, and has been made for the purpose of being communicated to the plaintiff, in order that he might act upon it, and has sustained damage from the deceit(*l*). The general rule appears to be, that if any man makes a fraudulent representation for another to act upon, either directly or indirectly, and such representation is calculated to induce that other person to act on it, and he does act on it, the person who makes the representation is responsible in damages. Thus, where a director of a company puts forth transferable shares into the market, and publishes and circulates false statements and representations for the purpose of selling the shares, the false representation is deemed in law to be made to all persons who read the public announcements, and become purchasers of shares on the faith of the statements contained in them(*m*). But it must be shown that the damage of which the plaintiff complains was brought about by the wrongful act of the defendant(*n*).

1176 *False representations under pretence of a claim of right—False claim of lien.*—An action is maintainable for a false and malicious representation, though made under the pretence of a claim of right, if it was made without reasonable and probable cause, and must have been known to be false by the person making it, and special damage has resulted to the plaintiff from the wrongful act. Thus, where a defendant, knowing that there had been no agreement between him and the plaintiff for a lien on the plaintiff's goods, falsely pretended that he was entitled to a lien on them, and made the representation without any reasonable foundation for it, and from improper and malicious motives, and damage resulted therefrom to the plaintiff, it was held that the defendant was bound to make compensation to the plaintiff for the wrong done to him(*o*).

1177 *Representations by a person of his knowledge of a particular fact, when*

(*i*) Ld. Tenterden, C.J., Polhill *v.* Walter, 3 B. & Ad. 123. Milne *v.* Marwood, 15 C. B., 778; 24 Law J., C. P. 36.

(*k*) Pasley *v.* Freeman, 3 T. R. 60, 62. See Hubbard *v.* Briggs, 31 N. Y. 518; White *v.* Merritt, 7 N. Y. 352; Weed *v.* Case, 55 Barb. 534.

(*l*) Langridge *v.* Levy, *ante*, p. 1004.

(*m*) Scott *v.* Dixon, 29 Law J., Exch. 62, n. Bedford *v.* Bagshaw, ib. 63. Ld. Campbell, Wilde *v.* Gibson, 1 H. L. C. 623. Barry *v.* Croskey, *ante*, p. 1004. See Cazeaux *v.* Mali, 25 Barb. 578; Chester *v.* Dickerson, 52 Barb. 349.

(*n*) Collins *v.* Cave, 4 H. & N. 234; 28 Law J., Exch. 204.

(*o*) Green *v.* Button, 2 C. M. & R. 716.

he knows that he has no knowledge at all about it.—If a man undertakes positively to assert that to be true which he does not know to be true, and which he has no grounds for believing to be true, in order to induce another to act upon the faith of the representation, and the representation is acted upon and turns out to be false, and the person who has acted upon it has been deceived and damnified, he is entitled to maintain an action for compensation. Whoever pretends to positive knowledge of the existence of a particular fact, when in truth he knows nothing at all about it, does in reality make a wilful representation, which he knows to be false, and if the representation is made in order that another may rely upon it and act upon it, and it is acted upon, and damage flows from the false representation, the person making it is in principle guilty of wilful deception and fraud(*p*). Lord Mansfield lays it down generally that, in a representation made to induce a person to enter into a contract, it is equally actionable for a man to undertake to assert that of which he knows nothing, as to affirm that to be true which he knows to be false(*q*). And, says Lord Kenyon, "If a man affirms that to be true within his own knowledge which he does not know to be true, this falls within the notion of legal fraud. The fraud consists in asserting positively his knowledge of that which he did not know"(*r*). So, according to Maule, J., "If a man, having no knowledge whatever upon the subject, takes upon himself to represent a certain state of facts to exist, he does so at his peril; and if it be done either with a view to secure some benefit to himself, or to deceive a third person, he is in law guilty of a fraud; for he takes upon himself to warrant his own belief of the truth of that which he asserts. Although the person making the representation may have no knowledge of its falsehood, the representation may, nevertheless, have been fraudulently made"(*s*).

(*p*) Smout *v.* Ilbery, 10 M. & W. 10. Cresswell, J., and Wilde, C.J., Jarrett *v.* Kennedy, 6 C. B. 322. Erle, J., Jenkins *v.* Hutchinson, 13 Q. B. 743. Randell *v.* Trimen, 18 C. B. 786. A person may render himself liable to an action of damages for deceit, by stating his mere belief as knowledge. Thus, if a person has only an opinion or belief as to the quantity of the article he offers for sale and passes off such belief as knowledge upon the purchaser, it is an imposition and actionable if the quantity is overstated. And this is so if the vendor makes an absolute representation which is intended and understood as a statement upon knowledge, although the vendor does not in terms profess to have knowledge. A declaration is not deemed fraudulent which the speaker believes true. But if he is aware that he has only an opinion yet represents that opinion as knowledge, he cannot be said to believe his representation true. There must be a belief in the representation as made. Cabot *v.* Christie, 42 Vt. 121. See Marsh *v.* Falker, 40 N. Y. 562; Meyer *v.* Amidon, 45 N. Y. 169; Oberlander *v.* Spiess, 45 N. Y. 175; Wakeman *v.* Dalley, 51 N. Y. 27.

(*q*) Pawson *v.* Watson, Cowp. 788. Pulsford *v.* Richards, 17 Beav. 94.

(*r*) Haycraft *v.* Creasy, 2 East, 108.

(*s*) Evans *v.* Edmonds, 13 C. B. 786. Milne *v.* Marwood, 24 Law J., C. P. 87.

1178 *Statements and representations which must be authenticated by a signed writing—False representations concerning the conduct, credit, ability, trade, or dealings of third persons.*—By 9 Geo. 4, c. 14, s. 6, it is enacted, that no action shall be brought to charge any person upon, or by reason of, any representation or assurance made or given concerning or relating to the conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods, unless such representation or assurance be made in writing, signed by the party to be charged therewith. A representation to be made within the Act, must be of the third person's trustworthiness, as evidenced by his character, conduct, ability, credit, trade, or dealings, with intent that he may obtain personal credit on the faith of such representation(*t*). Any representation that a person may be trusted, constitutes a representation as to his credit and ability(*u*). If the representation is in writing, and signed by the defendant pursuant to the statute, and the defendant at the time he makes the representation knows that it is untrue, he will be responsible in damages in an action for deceit, if the plaintiff has been induced to give credit on the faith of it(*x*), although he has not relied altogether on the writing, but has trusted partly to the writing and partly to subsequent oral representations(*y*).

Where the defendant's son, being about to open a shop, applied to the plaintiffs for a supply of goods upon credit, stating that he had a capital of 300*l.* to begin with, and referred them to his father, the defendant, for a corroboration of his statement, and the plaintiffs wrote to the father inquiring whether the son had, as he asserted, 300*l.* capital his own property, and the defendant wrote in reply that he had, whereas the defendant knew that his son had nothing but borrowed capital, it was held that this was a fraudulent misrepresentation, for which the defendant was liable in damages to the plaintiffs in an action for deceit(*z*). But if the person makes the representation in good faith, honestly believing it to be true, and

(*t*) As to representations of the ability of parties, see Lyde *v.* Barnard, 1 M. & W. 101, and Hamar *v.* Alexander, 2 B. & P. N. R. 241, decided before the passing of the statute. A similar statute in Kentucky (Stanton's Rev. Sts. ch. 23, s. 1), was held inapplicable to representations and warranties of title made by an auctioneer of the title of goods sold by him, as the representations and warranties were not made for the sole benefit of the reputed owner of the goods sold but rather for the benefit of the auctioneer. Dent *v.* McGrath, 3 Bush (Ky.), 174. For the cases to which a similar statute in Massachusetts is applicable, see Iasigi *v.* Brown, 17 How. (U. S.) 183.

(*u*) Swan *v.* Phillips, 8 Ad. & E. 461.

(*x*) Pasley *v.* Freeman, 3 T. R. 51. Foster *v.* Charles, 6 Bing. 400; 7 Bing. 107.

(*y*) Tatton *v.* Wade, 18 C. B. 371. Wade *v.* Tatton, 25 Law J., C. P. 242.

(*z*) Corbett *v.* Brown, 8 Bing. 33.

has reasonable ground for his belief, he is not then responsible if he is altogether mistaken, and formed a wrong judgment in the matter, whatever damage may have resulted to the plaintiff therefrom(*a*).

1179 *Representations concerning the character, credit, trade, or dealings of co-partnerships and joint-stock companies—Authentication thereof by a signed writing.*—A representation by one of several partners as to the trustworthiness of the firm, is a representation as to the credit of another person within the statute. It is not the less a representation of the solvency of the other partners that it includes himself(*b*). The word "person" is of extensive signification, and is applicable to a corporation, sole or aggregate, as well as to a private individual(*c*); so that representations made by one member of a company as to the circumstances, credit, and condition of the company, in order to induce another to lend his money, or subscribe, or take shares in the undertaking, must be authenticated by a signed writing, in order to make the foundation of an action for deceit(*d*).

1180 *Misrepresentation by directors and officers of public companies—Publication of deceitful prospectuses and reports.*—Where a defendant, knowing that a joint-stock company, of which he was a promoter and director, was a bubble company, and that no *bond-fide* dividend could be paid upon the shares, fraudulently pretended by a signed writing to guarantee the bearers of shares a minimum annual dividend of 33 per cent., to induce persons to purchase shares, and the plaintiff, by reason of this representation, purchased shares, and lost his money, it was held that the defendant was responsible in damages to the plaintiff in an action for deceit(*e*). And where the defendant, a director of a joint-stock bank, sanctioned the publication of a report, with his signature attached thereto, professing to set forth the state and condition of the bank, and representing that a particular dividend had been fairly earned, and was properly payable out of the profits, and the report was publicly sold, and the plaintiff purchased a copy of it, and read it, and bought shares in the bank, relying on its correctness, and the bank was proved to be insolvent to the knowledge of the defendant, at

(*a*) Haycraft *v.* Creasy, 2 East, 105.

(*b*) Devaux *v.* Steinkeller, 6 B. N. C. 89.

(*c*) Boyd *v.* Croydon Rail. Co., 4 B. N. C. 669.

(*d*) As to the recovery of money paid on the strength of fraudulent representations of the conditions of trading companies, see Wontner *v.* Shairp, 4 C. B. 439; Watson *v.* Earl of Charlemont, 12 Q. B. 856. An action will lie against one member of a firm for making false representations as to the solvency of his firm, even though the party injured has recovered judgment against the firm for goods sold on credit in consequence of such misrepresentations. Morgan *v.* Skidmore, 55 Barb. 263.

(*e*) Gerhard *v.* Bates, 2 Ell. & Bl. 490. See Paddock *v* Fletcher, 42 Vt. 389.

the time he sanctioned the publication of the report, and the plaintiff lost his money, and incurred serious liabilities, it was held that he was entitled to maintain an action against the defendant for damages(*f*).

If, therefore, directors of public companies authorize the publication and circulation of prospectuses and advertisements concerning the transactions and monetary affairs of the company, containing statements, with their signatures annexed thereto, which are false, to the knowledge of the directors, or which the directors, from their position and means of knowledge, may fairly be taken to warrant as true(*g*), or if, on the formation of the company, they conceal a material fact, they will be personally responsible, both at law and in equity, to parties who have taken shares, and invested money in the company, on the faith of those prospectuses, and have sustained damage in consequence thereof(*h*). But the person defrauded would not, it seems, in such a case, be entitled to sue the company for the deceit(*i*). So, if the officers of the company knowingly and fraudulently aid in the concoction of false and deceitful reports, to induce persons to invest in the company, and investments are made and losses sustained by persons who have acted on the faith of such reports, the officers so acting will be responsible to the parties they have defrauded(*k*).

Directors and officers so acting may also be punished for a misdemeanor or fined, etc.(*l*). These statutes, however, do not in anywise interfere with the civil remedy by way of action against any such director, manager, or officer, for damages for fraud and deceit; the rule requiring parties to proceed for the criminal offence before they pursue their civil remedy applying only, as we have seen, to *felonies*(*m*).

(*f*) Scott *v.* Dixon, 29 Law J., Q. B. 62, n. Bedford *v.* Bagshaw, 4 H. & N. 538; 29 Law J., Exch. 59. Barry *v.* Croskey, *ante*, p. 1004. Stainback *v.* Fernley, 9 Sim. 566.

(*g*) *Ante*, p. 1007. Taylor *v.* Ashton, 11 M. & W. 415. New Brunswick, etc., Rail. Co. *v.* Conybeare, 31 Law J., Ch. 297. The same *v.* Muggeridge, 30 ib. 243; 1 Dr. & Sm. 363. Smith's case, L. R., 2 Ch. App. 604. The rule that to sustain an action for fraud founded upon false representations, it must be made to appear that the party making them believed or had reason to believe that the representations were false, or that without knowledge he assumed or intended to convey the impression that he had actual knowledge of their truth, and that the plaintiff relied upon them to his injury, is applicable to the case of representations made by a director of a corporation, in the form of published statements and reports as to its financial condition. Knowledge of all the affairs of the company cannot be imputed to him for the purpose of charging him with fraud. Wakeman *v.* Dalley, 51 N. Y. 27.

(*h*) Clarke *v.* Dixon, 28 Law J., C. P. 225; 6 C. B., N. S. 453. Hill *v.* Lane, L. R., 11 Eq. Ca. 215. Peek *v.* Gurney, L. R., 13 Eq. Ca. 79. See Paddock *v.* Fletcher, 42 Vt. 389. Or the shareholders may plead fraud in an action for calls. Bwich-y-plwm Mining Co. *v.* Baynes, L. R., 2 Exch. 324.

(*i*) Western Bank of Scotland *v.* Addie, L. R., 1 Sc. & Div. App. 158, 166, 167. See Henderson *v.* Lacon, L. R., 5 Eq. Ca. 249; and *post*, p. 1037, 1038.

(*k*) Cullen *v.* Thompson, 6 Law T. R., N. S. 870.

(*l*) 24 & 25 Vict. c. 96, s. 84; 31 & 32 Vict. c. 119, s. 5; 33 & 34 Vict. c. 61, s. 19; 34 & 35 Vict c. 78, s. 10.

(*m*) *Ante*, p. 43.

To support the action, the plaintiff must prove that he acted on the faith of the representation, and sustained actual pecuniary damage in consequence thereof(*n*), and that the statements were false, not highly colored merely(*o*). But it is no answer that the plaintiff might have ascertained the truth by proper inquiry(*p*), or that the statements were in a sense literally true, if calculated and intended to mislead, *e.g.*, that so many shares had been already subscribed for, when in fact all that had been obtained was a contract to place so many(*q*), or that all that is stated is true, if material facts have been omitted(*r*). The plaintiff is, however, it seems, bound to make himself acquainted with the provisions of the articles of association(*s*), if they are in existence at the time of the contract(*t*), or within a reasonable time, *i.e.*, semble the earliest practicable time, after they are in existence(*u*). Although, however, he may thus sue the directors for fraudulent misrepresentation, or plead fraud to an action for calls brought by the company, or within a reasonable time(*x*) rescind and be relieved from the contract on the ground of fraud(*y*), he will still be liable as a contributory, in case the company winds up(*z*), so far as his original contract extends(*a*), unless it was annulled on the ground of misrepresentation or otherwise before the commencement of the winding up(*b*).

It is no answer by the directors to an injunction to restrain an action for calls that they believed the statements, and were themselves deceived(*c*); and it is sufficient to show that there was a fraudulent misrepresentation as to any part of the consideration that induced the defendant to enter into the contract. But a mere innocent misrepre-

(*n*) Eastwood *v.* Bain, 28 Law J., Exch. 74. Wakeman *v.* Dalley, 51 N. Y. 27.

(*o*) See Denton *v.* Macneil, L. R., 2 Eq. Ca. 352.

(*p*) Venezuela Rail. Co. *v.* Kisch, L. R., 2 H. of L. Ca. 99, in which case it was held that the statement of the capital of the company as 500,000*l.*, omitting the fact that 50,000*l.* would have to be paid for the concession, was fraudulent; and that the terms "available capital of the company" meant capital, exclusive of any borrowing powers. See, also, Ross *v.* Estates Investment Co., L. R., 3 Eq. Ca. 122.

(*q*) Ross *v.* Estates Investment Co., *supra*.

(*r*) Heyman *v.* European Central Rail. Co., L. R., 7 Eq. Ca. 154.

(*s*) Oakes *v.* Turquand, L. R., 2 H. of L. Ca. 326. *Ex parte* Briggs, L. R., 1 Eq. Ca. 483. *Re* Madrid Bank, 2 ibid. 218.

(*t*) Webster's case, L. R., 2 Eq. Ca. 741. Stewart's case, L. R., 1 Ch. App. 574. Hallows *v.* Fernie, L. R., 3 Eq. Ca. 520; 3 Ch. App. 467.

(*u*) *Re* Cachar Company, L. R., 2 Ch. App. 412. *Re* Madrid Bank, ib. 536. Peel's case, ib. 674.

(*x*) See Whitehouse and Tait's cases, L. R., 3 Eq. Ca. 790, 795. Downes' *v.* Price, L. R., 3 Engl. and Ir. App. 343. Ashley's case, L. R., 9 Eq. Ca. 263. M'Neil's case, 10 ibid. 503.

(*y*) Kent *v.* Freehold Land Co., L. R., 4 Eq. Ca. 588.

(*z*) Oakes *v.* Turquand, *ut sup.* Kent *v.* Freehold Land Co., L. R., 3 Ch. App. 493.

(*a*) Waterhouse *v.* Jamieson, L. R., 2 Scotch App. 29.

(*b*) Wright's case, L. R., 7 Ch. App. 55.

(*c*) Smith *v.* Reese River Mining Co., L. R., 2 Eq. Ca. 264; 2 Ch. App. 604; 4 Eng. and Ir. App. 65.

sentation, *bonâ fide* made, and on reasonable and probable ground, is not sufficient, unless it goes to the root of the matter, and makes the shares he has got something totally different from what he contracted to get(*d*). And a misrepresentation of law, *e.g.*, that a company is legally competent to issue certain securities, made to an intending lender, but which turns out to be incorrect, will not entitle the lender to relief on the ground of misrepresentation(*e*).

The representations of a director or manager, or a clerk, are not the representations of the company, unless they are adopted and ratified by the shareholders at a general meeting of the company(*f*). But the representations of the promoter may be, in certain cases(*g*).

By the 30 & 31 Vict., c. 131, s. 38, it is enacted that every prospectus of a company, and every notice inviting persons to subscribe for shares, shall specify the dates and names of any contract entered into by the company, or by the promoters, directors, or trustees thereof, before the issue of the prospectus, whether subject to adoption by the directors or not, and that every prospectus or notice not specifying the same shall be deemed fraudulent on the part of the promoters, directors, or officers knowingly issuing the same, as regards any person taking shares in the company on the faith of the prospectus, unless he has had notice of the contract.

1181 *Fraudulent breach of warranty.*—Whenever the representation or statement amounts to a warranty of the fact stated, and is untrue, it is fraudulent, in contemplation of law, whether there was knowledge or want of knowledge of the untruth on the part of the person making it. "If one man," observes Lord Ellenborough, "lull another into security as to the goodness of a commodity he offers for sale, by giving him a warranty of it, it is the same thing whether or not the the seller knew it at the time to be unfit for sale: the warranty is the thing which deceives the buyer who relies on it, and is thereby put off his guard, and it is sufficient to prove the warranty broken to establish the deceit(*h*). If therefore a watchmaker warrants a watch to go well, or

(*d*) Kennedy *v.* Panama Steam Co., L. R., 2 Q. B. 580.

(*e*) Rashdall *v.* Ford, L. R., 2 Eq. Ca. 750. See Hallows *v.* Fernie, *supra*. When time is a bar; Smallcombe's case, L. R., 3 Eq. Ca. 769.

(*f*) Royal Brit. Bank, *In re*, 3 Law T. R., N. S. 843; 9 W. R. 328. See Ferguson *v.* Wilson, I. R. 2 Ch. App. 77.

(*g*) Ross *v.* Estates Investment Co., L. R., 3 Eq. Ca. 122. *S. C*, 3 Ch. App. 682.

(*h*) Williamson *v.* Allison, 2 East, 450. To the contrary, see Ross *v.* Mather, 51 N. Y. 108, 112. In Rose *v.* Hurley (39 Ind. 77), it was held erroneous to characterize the same transaction as at the same time a warranty and a fraud, as a warranty rests upon contract, while fraud, or fraudulent representations, have no element of contract in them, but are essentially a tort; that when judges or law writers speak of a fraudulent warranty, the language is neither accurate nor perspicuous; that there is no more propriety in characterizing a warranty

a horse-dealer warrants his horse to be sound, or quiet and free from vice, or a wine merchant warrants his claret to be in a fit and proper state for exportation, or a copper manufacturer warrants his copper to be fit for sheathing vessels, and a purchaser buys on the faith of the warranty, and then finds that the watch will not go, or that the horse is unsound or vicious, or that the claret is sour, or that the copper is unfit for sheathing, this is a fraud, though neither the watchmaker, the horse-dealer, nor the copper manufacturer was aware of the fact at the time he gave the warranty(*i*). A warranty will not bind a man in a thing that is apparent; as to warrant that a horse has both his eyes when he is manifestly blind of one of them, or that a house is in perfect repair, when it has neither roof nor windows(*k*). To warrant a thing that may be perceived at sight is not good(*l*). If, therefore, at the time of the sale of a horse the animal is warranted sound, that is understood to mean, saving those manifest and visible defects which are obvious to all mankind, and known to the purchaser at the time he bought the animal(*m*). If, however, the manifest defect is not necessarily of a permanent nature; if a horse has a cough and running at the nose, and the vendor says that it is merely a cold, and that the horse will be sound and well in a given time, and the purchaser buys in reliance upon the truth of the representation, the vendor, as we have seen, will be responsible in damages if the horse continues unsound and permanently diseased(*n*). And a purchaser who relies upon a warranty is not bound to make any particular examination of a horse before he buys, to ascertain whether a defect exists. If, relying upon the warranty, he neglects to make any

fraudulent because of a breach, than in characterizing any other contract fraudulent because there has been a breach of it; and that to speak of a false representation as a contract or warranty, or as tending to prove a contract or warranty, is a perversion of language, and of correct ideas. But as to the last proposition see Carter *v.* Abbott, 33 Iowa, 180.

(*i*) Wallace *v.* Jarman, 2 Stark. 162. Anon., Lofft, 146. Gresham, *v.* Postan, 2 C. & P. 540. Williamson *v.* Allison, 2 East, 446. Jones *v.* Bright, 3 M. & P. 173. That it is unnecessary to prove that the defendant knew that the representations made by him were false in such cases. See Vanleer *v.* Earle, 26 Penn. St. 277.

(*k*) Ekins *v.* Tresham, 1 Lev. 102. Dyer *v.* Hargrave, 10 Ves. 507.

(*l*) Baily *v.* Merrell, 3 Bulstr. 95. Jordan *v.* Foster, 6 Eng. 139. A vendor may warrant against a defect which is patent and obvious, as well as against any other. Pinney *v.* Andrus, 41 Vt. 631.

(*m*) Margetson *v.* Wright, 5 M. & P. 606; 7 Bing. 603. That a general warranty does not cover manifest visible defects, known to the purchaser at the time of taking the warranty, see Day *v.* Pool, 52 N. Y. 416; Scarborough *v.* Reynolds, 13 Rich. (S. C.) L. 98; Williams *v.* Ingram, 21 Texas, 300; Hill *v.* North, 34 Vt. 604; Marshall *v.* Drawhorn, 27 Ga. 275; Livingston *v.* Arrington, 28 Ala. 424; Schuyler *v.* Russ, 2 Cal. 202.

But to exclude visible defects from the operation of the contract of warranty, they must be such as can be observed by an ordinary observer examining the property with a view to trade, and such as do not require skill to detect them. Birdseye *v.* Frost, 34 Barb. 367.

(*n*) Liddard *v.* Kain, 9 Moore, 356. Hill *v.* North, 34 Vt. 604. Chadsey *v.* Greene, 24 Conn. 562.

particular examination of the animal, and fails consequently to discover a defect, which might have been ascertained by examination, he is, nevertheless, entitled to maintain an action for deceit(*o*).

The purchaser of a warranted but worthless article is entitled to maintain an action for deceit, although he has stipulated that if he dislikes the article it shall be exchanged for another of the same value(*p*).

1182 *Warranties made pending a negotiation for the sale of property.*—"As to selling with a warranty," observes Holt, C.J., "that will be so though the warranty be before the sale; as if, upon a treaty about the buying of certain goods, the buyer should ask the seller if he would warrant them to be of such a value, and to be his own goods, and the seller should warrant them, and then the buyer should demand, and the seller set the price, and then the buyer should take time to consider for two or three days, and then should come and give the seller his price; though the warranty here was before the sale, yet this will be well, because the warranty is the ground of the treaty, and this is selling with a warranty. But it is otherwise if the warranty be after the sale; as if a man sells goods and afterwards warrants them, such warranty is not good. But in the other case the warranty is part of the contract(*q*).

1183 *Private representations made prior to a sale by auction forming no part of the public contract of sale.*—If what passes between a vendor and purchaser forms no part of the negotiation ending in the purchase, it cannot be treated as a warranty. Thus, in the case of a sale by auction, you cannot "tack on a previous private communication to what is said by the auctioneer at the time of the actual public sale, in order to constitute a warranty. To permit such a practice," observes Maule, J., "would be to encourage a fraud upon all others attending the sale." If, therefore, a horse is advertised to be sold by auction without a warranty, and the owner privately represents the horse to be sound

(*o*) Holyday *v.* Morgan, 1 Ell. & Ell. 1; 28 Law J., Q. B. 9. See Aberaman Iron Works *v.* Wickens, L. R., 4 Ch. App. 101; Thompson *v.* Bertrand, 23 Ark. 730. But see Vandewalker *v.* Osmer, 65 Barb. 556.

(*p*) Wallace *v.* Jarman, 2 Stark, 162. Perrine *v.* Serrel, 1 Vroom (N. J.), 454.

(*q*) Lysney *v.* Selby, 2 Ld. Raym. 1120; 1 Salk. 211. Canham *v.* Barry, 15 C. B. 597; 24 Law J., C. P. 100. Roscorla *v.* Thomas, 3 Q. B. 236. Wilmot *v.* Hurd, 11 Wend. 584. Summers *v.* Vaughan, 35 Ind. 323. Fairbault *v.* Sater, 13 Minn. 223. Burton *v.* Young, 5 Harring. (Del.) 233. See Webster *v.* Hodgkins, 5 Foster (N. H.), 128.

A warranty made subsequent to a sale, upon a new consideration, or upon one distinct from that of the sale is valid. Congar *v.* Chamberlain, 14 Wis. 258.

Representations made in the course of a negotiation resulting in a sale, are no part of the contract if the contract of sale is afterwards reduced to writing and signed, and does not contain the representations. 1 Curtis, Ct. Ct. 90.

and free from vice, to a person who attends the sale, and bids for and purchases the horse in reliance on the representation, the representation cannot be treated as a warranty. Those who bid at a public auction, bid against each other on the supposition that they all stand upon an equal footing; and if the sale is announced and conducted as a sale without a warranty, and the biddings are made upon that understanding, any secret underhand bargain for a warranty would be a fraud(*r*).

1184 *False representations amounting to a warranty by a person of his knowledge of a particular fact, where the means of knowledge lie peculiarly or exclusively within his reach.*—If the means of information lie peculiarly or exclusively within reach of the person making the representation, and he pretends to know the truth of the matter, he must be taken to warrant his knowledge of the fact, and his want of knowledge constitutes a fraud(*s*). Thus, a jeweller or a diamond merchant, who deals in diamonds and precious stones, has better means of knowing the nature and quality of the stones he sells than an unskilled stranger who comes to his shop to buy them. If, therefore, he represents a glittering stone to be a diamond, he impliedly warrants his knowledge of the truth of his representation. His statement amounts to a warranty of the fact to a purchaser, and the jeweller is responsible if the stone turns out to be only a piece of crystal, whether he knew the representation to be true or false(*t*). Where the vendor of a ship published a written description of the vessel, without knowing whether the description was true or false, and the vessel was afloat and the hull covered with water, so that the purchaser had no means of examining the hull himself, it was held that the vendor must be considered to have warranted the fact to be as he asserted, and that his want of knowledge constituted a fraud. "If he made the representation," observes Lord Mansfield, "not knowing at the time whether it was true or false, it is a fraud, if, in point of fact, it turns out to be false. It is equally false and fraudulent for a man to affirm his knowledge of that of which he knows nothing, as to aver that to be true which he knows is not true"(*u*).

(*r*) Hopkins *v.* Tanqueray, 15 C. B. 130; 23 Law J., C. P. 162.

(*s*) Cave *v.* Coleman, 3 M. & Ry. 4. Salmon *v.* Ward, 2 C. & P. 211. Liddard *v.* Kain, 9 Moore, 356.

(*t*) Chandelor *v.* Lopus, 1 Smith's Lead. Cas., 6th ed.

(*u*) Schneider *v.* Heath, 3 Campb. 506. Pawson *v.* Watson, Cowp. 788. Adamson *v.* Jarvis, 4 Bing. 73. Mitchell *v.* Zimmerman, 4 Texas, 75. Cabot *v.* Christie, 42 Vt. 121; 1 Story's Eq. s. 193.

A person who makes a statement *as of his own knowledge*, concerning a matter of which he has only a belief or opinion, is responsible for the damages he may thereby cause to one rely-

1185 *Representations concerning matters which are obvious to ordinary intelligence, and which lie as much within the knowledge of one party as the other.*—Where the real quality of the thing is an object of sense obvious to ordinary intelligence, and the parties making and receiving the representation have equal knowledge or means of acquiring information, and the correctness or incorrectness of the representation may be ascertained by the party interested in knowing the truth, by the exercise of ordinary inquiry and diligence, and the representation is not made for the purpose of throwing the latter off his guard, and preventing him from making those inquiries and examinations which every prudent person ought to make, there is no warranty of the person's knowledge of the truth of his representation, or of the fact being as it is stated to be(*x*). In an action for deceit, it appeared that the defendant having a load of wood to be carried, came to the plaintiff, who was a carrier, and bargained with him for the carriage of it at 2*s.* a hundredweight, representing that there were eight hundredweight; whereupon the plaintiff, relying upon the representation, caused the wood to be put into his cart and carried, but finding that he had got an overpowering load, and having killed two of his horses in dragging it along, he caused the wood to be weighed, when he found the weight to be twenty hundredweight; and thereupon he brought an action to recover compensation for the damage he had sustained by reason of the deceit; but it was held that the action was not maintainable, as it was his own fault not to have weighed the wood before he put it into his cart. "There is a difference," observes Dodderidge, J., "where the carrier is absent and where he is present; for where the carrier is there present, it is very easy for him to see the difference between 800 and 2000 weight"(*y*).

ing upon such statement, if it prove false in fact. But one who merely expresses his honest opinion or belief, without assuming to speak from personal knowledge, is not responsible for the falsity of the statement to one who has relied upon its truth. In both cases damage has resulted from a reliance upon a statement which has proved false in fact; and in both cases the speaker believed the statement made by him to be true. In the former case the party assuming to know what in fact he does not, is guilty of falsehood in thus assuming, the falsehood consisting in the assumption, irrespective of his belief of the fact itself, and the concurrence of damage with the intent to deceive constitutes actionable fraud. In the latter case the intent to deceive is wanting, and this is an essential ingredient of actionable fraud. Neither damage or fraud singly gives a right of action. To sustain an action for deceit, both must concur. Marsh *v.* Falker, 40 N. Y. 562. Chester *v.* Comstock, 40 N. Y. 575. Wakeman *v.* Dalley, 51 N. Y. 27. Meyer *v.* Amidon, 45 N. Y. 169. Oberlander *v.* Spiess, 45 N. Y. 175. Hubbell *v.* Meigs, 50 N. Y. 481. Cabot *v.* Christie, 42 Vt. 121. Tryon *v.* Whitmarsh, 1 Met. 1. Munro *v.* Gairdner, 3 Brevard, 31.

(*x*) Clapham *v.* Shillito, 7 Beav. 150. Scott *v.* Hanson, 1 Sim. 14. Frenzel *v.* Miller, 37 Ind. 1. Bell *v.* Byerson, 11 Iowa, 233. See Hobbs *v.* Parker, 31 Me. 143.

(*y*) Baily *v.* Merrell, 3 Bulstr. 95. See Selway *v.* Fogg, *ante*, p. 1005.

1186 *Representations amounting merely to expressions of opinion and belief.*—When the representation is made concerning something which is mere matter of opinion, which every man can exercise his own judgment upon and inquire about, it is the plaintiff's own fault if he suffers himself to be deceived. If the person giving his opinion, or expressing his belief, does not possess any exclusive means of knowledge, and merely says that which he thinks to be true, there is no fraud, however erroneous may be the statement he has made. If, therefore, a defendant having reason to believe, and actually believing, a particular fact to be true, has represented it as such to the plaintiff, he is not, as we have seen, liable to an action merely because it turns out that he was mistaken, and that his representation was false(*z*). The credit to which a man is entitled in the commercial world, is a matter which does not lie exclusively within the knowledge of any one person. It is to a great extent matter of judgment and opinion, on which different men will form different opinions, and if a man in answer to inquiries respecting the solvency or credit of a particular individual, or of a partnership, or joint-stock company, does no more than state his own honest opinion, believing what he says to be true, he is not responsible for the correctness of his opinion, and does not warrant the fact to be as represented by him(*a*).

1187 *Statements in answer to inquiries—Information to sheriffs and police officers.*—If a sheriff, about to seize the goods or the person of a debtor under a writ of execution, makes inquiry of another as to whether certain goods do or do not belong to the debtor, or as to the identity of the person of the debtor, and the person applied to for information does no more than represent what he believes to be true, he is not responsible in an action for deceit, if the information he gives turns out to be false, and the sheriff who has acted upon it to be true has been damnified; but if a person officiously interferes and gives directions to the sheriff, he may make himself responsible for trespasses committed by the sheriff whilst acting in obedience to those directions, and may become liable to make good any damages which the sheriff himself has been obliged to pay in consequence of his having obeyed such directions(*b*); but it has been held that a mere indication of the

(*z*) Collins *v.* Evans, 5 Q. B. 826. Childers *v.* Wooler, 29 Law J., Q. B. 136. Rashdall *v.* Ford, *ante*, p. 1012. Marsh *v.* Falker, 40 N. Y. 562. Wakeman *v.* Dalley, 51 N. Y. 27. Meyer *v.* Amidon, 45 N. Y. 169. Oberlander *v.* Spiess, 45 N. Y. 175. Hubbell *v.* Meigs, 50 N. Y. 481. Cabot *v.* Christie, 42 Vt. 121. Weed *v.* Case, 55 Barb. 534.

(*a*) Haycraft *v.* Creasy, 2 East, 105.

(*b*) Collins *v.* Evans, 5 Q. B. 830. See *ante*, pp. 717, 718.

defendant's place of residence, indorsed on the back of a writ of *fi. fa.* by the attorney of the plaintiff, for the purpose of affording the sheriff information, is not a direction to execute a writ against the person pointed out, so as to render the attorney responsible if the indorsement should turn out to be incorrect, and to relieve the sheriff from the responsibility of making inquiry, and acting in the matter upon his own responsibility(*c*).

1188 *Warranties by vendors on sales of real property.*—If, pending a negotiation for the sale of real property, the vendor affirms the rents to be more than they really are, and the person to whom the affirmation is made relies upon it and purchases the property, the vendor is liable to an action for deceit whether he knew or did not know of the falseness of the affirmation at the time it was made, and although a conveyance is subsequently executed which contains no notice of any such affirmation. A representation of this sort has been held to amount to a warranty of the fact, on the ground that the vendor had better means of knowledge than the purchaser, who relied upon the truth of the statement and was deceived by it; "for," says Gould, J., "the value of the rents was a thing hard to be known, and secret, known to none but the landlord and his tenants, and they might be in confederacy together." "If," observes Holt, C. J., "the vendor gives in a particular of the rents, and the vendee says he will trust him and inquire no further, but rely upon his particular, there, if the particular be false, an action will lie; but if the vendee will go and inquire further what the rents are, there it seems unreasonable he should have an action, though the particular be false, because he did not rely upon the particular"(*d*). And even if the rent stated is literally true, but the fact is that the property had been only let for one year at the rent stated, which was far above its value, so that the statement is calculated to mislead, the vendee is entitled to be relieved in equity from his purchase(*e*). On the other hand, a statement which is not literally true, but which does not substantially mislead, is not ground for annulling a contract; as where a vendor of a leasehold house stated himself as a lessee for twenty-four years, whereas he was an under-lessee for that period, less three days(*f*).

(*c*) Childers *v.* Wooler, 29 Law J., Q. B. 129; *diss.* Wightman, J., Cronshaw *v.* Chapman, *ante*, p. 809.

(*d*) Lysney *v.* Selby, 2 Ld. Raym. 1120. Ekins *v.* Tresham, 1 Lev. 102. See Bos *v.* Helsham, L. R., 2 Exch. 72. See Simar *v.* Canaday, 53 N. Y. 298; 56 N. Y. 83.

(*e*) Dimmock *v.* Hallett, L. R., 2 Ch. App. 21.

(*f*) Duddell *v.* Simpson, L. R., 2 Ch. App. 102. See Aberaman Iron Works *v.* Wickens, L. R., 4 Ch. App. 101.

Where the vendor of a public-house made, pending the treaty for the sale of the house, sundry false representations to the plaintiff concerning the amount of business done in the house, and the rent received for part of the premises, whereby the plaintiff was induced to give a larger sum than he would otherwise have given for the property, it was held that the plaintiff was entitled to maintain an action against the defendant for the deceit(*g*).

1189 *False representations of title by vendors of corporeal and incorporeal hereditaments—Representations not amounting to a warranty.*—Representations and assertions of title by a vendor of real property, where the title-deeds are submitted to the inspection of the purchaser, who exercises his own or such other judgment as he confides in on the goodness of the title, amount only to expressions of opinion and belief, and cannot be treated as a warranty(*h*). Every prudent purchaser of real property looks into the title of the vendor before he accepts a conveyance and pays the purchase-money, and he has a right to have a covenant for title on the part of the vendor inserted in the deed of conveyance; and if he waives his right of examination and approval of the title, and does not think fit to require any covenant for title on the part of the vendor, he must be presumed to have been content to take whatever estate or interest in the land the vendor might chance to possess, and when the vendor's title, such as it is, is actually conveyed to him, the rule of *caveat emptor* applies(*i*). But if a representation as to title was false, to the knowledge of the person making it, and was made for the purpose of preventing inquiry and covering a fraud, then it may be made the foundation of an action for deceit, although the party receiving and acting upon the representation had accepted a conveyance, without requiring any covenant for title(*k*).

1190 *Representation of title on sales of chattels amounting to a warranty.*—"Where one having the possession of any personal chattel sells it, the bare affirming it to be his," observes Holt, C.J., "amounts to a warranty, and an action lies on the affirmation; for his having possession is a color of title, and perhaps no other title could be made; *aliter* where the seller is out of possession, for there may be room to question the seller's title, and *caveat emptor* in such a case to have either an

(*g*) Dobell *v.* Stevens, 3 B. & C. 623. Canham *v.* Barry, 15 C. B. 597.

(*h*) Roswell *v.* Vaughan, Cro. Jac. 196. See Hume *v.* Pocock, L. R., 1 Ch. App. 379.

(*i*) Bree *v.* Holbech, 2 Doug. 655; Ld. Alvanley, C.J., in Johnson *v.* Johnson, 3 B. & P. 170. Duke *v.* Barnett, 2 Coll. Ch. C. 337. Maynard *v.* Mosely, 3 Swanst. 655.

(*k*) See per Turner, L. J., in Hume *v.* Pocock, L. R. 1 Ch. App. 385.

express warranty or a good title"(*l*). Mr. Justice Buller, however, has disclaimed any distinction between the vendor's being in or out of possession, treating the affirmation as equivalent to a warranty in both cases(*m*), the true principle being, "that he who affirms either what he does not know to be true, or knows to be false, to another's prejudice and his own gain, is both in morality and law guilty of falsehood, and must answer in damages"(*n*). In the ordinary case of a sale of goods in a shop the seller does in effect warrant that the goods are his own, and is liable if they are not(*o*). However, if a man does not sell as owner, but in some special character or capacity, such as sheriff or pawnbroker, and does not make any representation as to title, he is presumed to sell only such a title as he actually possesses(*p*). Where the defendant sold a boiler (affixed to a house, but removable piecemeal without injury), which had been distrained for a poor-rate, and which he had bought at the auction, to the plaintiff, explaining to him at the same time the circumstances, it was held that the plaintiff (who had been prevented by the mortgagees of the house from removing it) could not sue the defendant on a warranty of title, or upon an implied undertaking that he should be permitted to remove it(*q*).

1191 *False representations by manufacturers of the character and quality of the articles they manufacture and sell.*—The manufacturer of an article has superior means of information as to the nature and quality of the article he makes than a stranger not engaged in the manufacture. If, therefore, he represents the article he makes to be of some superior or peculiar quality, or to be fit for some particular purpose, in order to recommend it to a purchaser, his representation amounts to a warranty of the fact. "It is not necessary," observes Best, C.J., "that the seller should say, 'I warrant;' it is sufficient if he says that the article he sells is of a particular quality, or fit for a particular specified purpose." Where, therefore, the plaintiff, a shipowner, on being intro-

(*l*) Medina *v.* Stoughton, 1 Salk. 210. Crosse *v.* Gardner, Carth. 90. Gross *v.* Kierski, 41 Cal. 111. Shattuck *v.* Green, 104 Mass. 42. McCoy *v.* Artcher, 3 Barb. 323. Edick *v.* Crin, 10 Barb. 445. Storm *v.* Smith, 43 Miss. 497. Scranton *v.* Clark, 39 N. Y. 220. Hopkins *v.* Grinnell, 28 Barb. 533; 2 Kent's Comm. 478. Norton *v.* Hooten, 17 Ind. 365. Davis *v.* Smith, 7 Minn. 414. Huntington *v.* Hall, 36 Me. 501. Lackey *v.* Stouder, 2 Carter (Ind.), 376. Wood *v.* Cavin, 1 Head (Tenn.), 506. Long *v.* Hickingbottom, 28 Miss. 772. The possession of a third person as bailee for all the tenants in common of a chattel is so far the possession of each tenant in common as to attach to a sale by either of them an implied warranty of title. Shattuck *v.* Green, 104 Mass. 42.

(*m*) Pasley *v.* Freeman, 3 T. R. 58.

(*n*) Per Best, C.J., Adamson *v.* Jarvis, 4 Bing. 73. Furnis *v.* Leicester, Cro. Jac. 474, 1 Rol. Abr. 90, pl. 6.

(*o*) Eicholz *v.* Bannister, 34 Law J., C. P. 105.

(*p*) Chapman *v.* Speller, 14 Q. B. 624. Morley *v.* Attenborough, 3 Exch. 500.

(*q*) Baguely *v.* Hawley, L. R., 2 C. P. 625.

duced to the defendant, a copper manufacturer, stated that he wanted some copper for sheathing a vessel, and the defendant said, "We will supply you well," whereupon the plaintiff gave an order for some copper, it was held that this amounted to a warranty on the part of the copper manufacturer that the copper he supplied to the plaintiff in execution of the order should be fit for sheathing vessels, and that he was responsible in an action for deceit for furnishing defective copper unfit for that purpose. This tends to protect the purchaser, who is necessarily ignorant of the nature of the article sold, from imposition, whilst the person who manufactures it must, or ought to, know its particular virtues and qualities(*r*). But when the purchase is of a well-known ascertained article, and the manufacturer represents that it is fit for the purpose for which it is made, and for which it is generally used, there is no warranty on the part of the vendor that it is fit for any peculiar or special purpose for which the purchaser requires it(*s*).

A person who receives the order and gets the article made is as much the manufacturer of it as the person who actually makes it(*t*).

1192 *Representations by a vendor who is told that the purchaser wants the article he proposes to buy for a particular purpose.*—If a stranger goes to a shop and tells the shopkeeper that he wants an article fit for a particular specified purpose, and it is the clear understanding of the parties that the purchaser relies upon the skill and judgment of the shopkeeper for the supply of an article fit for the purpose specified, there is an implied warranty on the part of the shopkeeper that the article he furnishes is reasonably fit for that purpose. "It appears to me," observes Tindal, C.J., "to be a distinction well founded, both on reason and on authority, that if a party purchases an article upon his own judgment, he cannot afterwards hold the vendor responsible, on the ground that the article turns out to be unfit for the purpose for which it was required; but if he relies upon the judgment of the seller, and informs him of the use to which the article is to be applied, it seems to me the transaction carries with it an implied warranty that

(*r*) Jones *v.* Bright, 3 M. & P. 174; 5 Bing. 533. When a manufacturer of an article sells it for a particular purpose to one who makes known to him that he buys it for that purpose, he thereby warrants it fit for that purpose and free from latent defects. Lespard *v.* Van Kirk, 27 Wis. 152. Ketchum *v.* Wells, 19 Wis. 25. Fisk *v.* Tank, 12 Wis. 276. Cunningham *v.* Hall, Sprague, 404. Hoe *v.* Sanborn, 21 N. Y. 552. Overton *v.* Phelan, 2 Head (Tenn.), 445. Brown *v.* Murphee, 31 Miss. 91. Walton *v.* Cody, 1 Wis. 420. Beers *v.* Williams, 16 Ill. 69. Getty *v.* Rountree, 3 Chand. (Wis.) 28.

(*s*) Chanter *v.* Hopkins, 4 M. & W. 399. Camac *v.* Warriner, 1 C. B. 367.

(*t*) Brown *v.* Edgington, 2 M. & Gr. 279. Addison on Contracts, 8th ed., p. 213.

the thing furnished shall be fit and proper for the purpose for which it was designed"(*u*).

1193 *False representations by vendors made to absent purchasers amounting to a warranty.*—Wherever the purchaser has no opportunity of inspecting the commodity he buys, the rule of *caveat emptor* does not apply. Every representation, therefore, made by a vendor to an absent purchaser, as to the quality or fineness of the article he offers for sale, amounts to a warranty of the fact to such absent purchaser, who has no means of judging for himself, but relies exclusively on the judgment and good faith of the vendor(*x*). If a purchaser orders a particular article to be forwarded to his agent abroad for a foreign market, and the vendor executes the order, and pretends or represents, that he has sold the particular article required, and the purchaser has had no opportunity of inspection or examination, the representation of the vendor amounts to a warranty of the fact(*y*). If an article, represented to be of a particular or peculiar quality, turns out to be of a substantially different or inferior quality, it does not accord with the representation, and damages are therefore recoverable(*z*). "A seller," observes Lord Ellenborough, "is unquestionably liable to an action for deceit if he fraudulently misrepresent the quality of the thing sold to be other than it is in some particulars which the buyer has not equal means with himself of knowing, or if he do so, in such a manner as to induce the buyer to forbear from making the inquiries, which, for his own security and advantage, he would otherwise have made"(*a*).

1194 *False representations by vendors where the purchaser has means of examination and judgment—Sale of goods by sample.*—Whenever the vendor is not himself the manufacturer of the goods he sells, and the purchaser is afforded the means of inspection and examination, and of forming his own judgment of their quality, the representations made by the vendor of the quality of the goods amount merely to assertions of his own opinion and belief, and not to a warranty. If, therefore, the representation is honestly made, and is believed at the time to be true by the person making it, it does not constitute a fraud in law, though it was not true in point of fact. The rule of *caveat emptor*

(*u*) Tindal, C.J., in Brown *v.* Edgington, 2 M. & Gr. 289. See Walker *v.* Milner, 4 F. & F. 745. Miller *v.* Gaither, 3 Bush. (Ky.), 152; Deming *v.* Foster, 42 N. H. 165; Barnett *v.* Stanton, 2 Ala. 195.

(*x*) Ld. Ellenborough, C.J., in Gardiner *v.* Gray, 4 Campb. 145.

(*y*) Bridge *v.* Wain, 1 Stark. 504.

(*z*) Wieler *v.* Schilizzi, 25 Law J., C. P. 90.

(*a*) Vernon *v.* Keys, 12 East, 637.

applies, and the representation does not furnish a ground of action(*b*).

Every person who exhibits a sample of goods for sale, impliedly represents or warrants that the sample has been fairly taken from the bulk of the commodity, and he does no more than this. The purchaser takes the risk of all latent defects and infirmities inherent in the article, and unknown to the seller, whether they arise from natural causes or fraudulent dealings with the goods by persons through whose hands they have passed. Thus, where the plaintiff bought hops(*c*) of the defendant, whom he knew not to be the grower, by samples taken from the pockets in which the commodity was closely packed, and at the time of the sale the samples answered fairly to the commodity in bulk, and no defect was perceptible at the time to the buyer; but, owing to the grower of the hops having fraudulently watered them after they were dried, to increase their weight, they gradually deteriorated in quality, and became utterly unsalable shortly afterwards, it was held that the defendant, who had fairly drawn and exhibited the samples, and was wholly ignorant of the fraud at the time of the sale, was not responsible for the latent defect afterwards discovered in the hops, although it rendered them unmerchantable, and of no value in the hands of the buyer. Here the vendor and purchaser had both equal means of knowledge. Both examined the sample, and neither of them discovered, or had the least idea of, the defect which was afterwards disclosed by the gradual process of heating. The maxim of *caveat emptor*, therefore, applied(*d*).

So, where cotton had been fraudulently packed in America, the interior of the bales being filled with bad, unmerchantable cotton, and the outer part of the bales, from whence the samples would be taken, with cotton of superior quality, and the cotton so falsely packed was consigned to a Liverpool merchant, who drew samples in the ordinary way, and exhibited them to the plaintiff, who purchased and received forty-five of the bales, and then brought his action against the defendant for the deceit, it was held that the action was not maintainable, unless the jury could see grounds for inferring that the defendants or

(*b*) Ormrod *v.* Huth, 14 M. & W. 664. Bartlett *v.* Hoppock, 34 N. Y. 118. Fields *v.* Rouse, 3 Jones' Law (N. C.), 72. Port *v.* Williams, 6 Ind. 219.

(*c*) See 29 & 30 Vict. c. 37, *post*, p. 1029. For the doctrine of implied warranty as applied to sales of cotton in bales by sample, see Oneida Manufacturing Co. *v.* Lawrence, 4 Cow. 440. Andrews *v.* Kneeland, 6 Cow. 354. Gallagher *v.* Warring, 9 Wend. 20. *S. C.* 18 Wend. 425. Beebe *v.* Robert, 12 Wend. 413. Boorman *v.* Jenkins, 12 Wend. 566. And for a review of these cases, see Hargous *v.* Stone, 5 N. Y. 73, 87.

(*d*) Parkinson *v.* Lee, 2 East, 320. See Barnard *v.* Kellogg, 10 Wall. 383.

their brokers were acquainted with the fraud that had been practised in the packing of the bales, or had themselves acted in the matter against good faith, or with some fraudulent purpose(*e*). And, generally, if it be understood that there is to be a purchase of the article shown by sample, and the sample is fairly taken from the bulk, there is no misrepresentation or deceit, although the vendor may have given an incorrect description of the age or quality of the article, provided the description was honestly given in full belief of its truth(*f*). A sale, however, by sample of goods to order includes a warranty of merchantable quality as to all matters that cannot be judged of by the sample(*g*).

1195 *False representations by railway companies amounting to a warranty.*— It has been held that railway companies must be taken to warrant the truth of the representations made by them in their published time-tables, as to the time of the starting of their trains, so that if the representation is untrue, it is what the law calls a fraudulent representation, and may be made the foundation of an action of deceit by any person who has relied upon the representation, and has sustained damage in consequence thereof(*h*).

(*e*) Ormrod *v.* Huth, 14 M. & W. 663.

(*f*) Carter *v.* Crick, 4 H. & N. 412; 28 Law J., Exch. 238.

(*g*) Mody *v.* Gregson, L. R., 4 Exch. 49; 38 Law J., Exch. 12. A contract of sale by sample is not, strictly speaking, a warranty of quality, but an agreement of one party to deliver and of the other to accept goods of the same kind and quality as the sample. To raise a warranty from a sale by sample, the sample must be so used between vendor and vendee as to express or become a part of the contract; or, in other words, the use of the sample must amount to and take the place of an express averment on the part of the vendee, of the condition and quality of the goods sold. The mere exhibition of a sample by the vendor does not amount to an averment of the quality of the goods sold, unless from the facts of the case it can be presumed that the parties arrived at an understanding that the bulk of the goods sold is to correspond with the sample. Gunther *v.* Atwell, 19 Md. 157. Beirne *v.* Dord, 5 N. Y. 95. Hargous *v.* Stone, 5 N. Y. 73.

But when a contract for the sale of goods is made by sample, it amounts to an undertaking on the part of the seller with the purchaser, that all the goods are similar, both in nature and quality, to those exhibited; and if they be not, the purchaser may either rescind the contract by returning the goods in proper time, or keep them and recover damages for the breach of such warranty. Waring *v.* Mason, 18 Wend. 425. Wright *v.* Hart, 18 Wend. 449. Moses *v.* Mead, 1 Denio, 378. Sands *v.* Taylor, 5 Johns. 395. Andrews *v.* Kneeland, 6 Cow. 354. Beebee *v.* Robert, 12 Wend. 413. Bradford *v.* Manly, 13 Mass. 139. Boorman *v.* Johnson, 12 Wend. 566. Beirne *v.* Dord, 5 N. Y. 95, 99; 2 Kent's Com. 481; Story on Cont., s. 540.

If there are no circumstances to qualify the transaction, there is a warranty on a sale of goods by sample that each package of the article shall correspond with the sample. But if the goods sold consist of several varieties and qualities of the same article, and the sample is made by mixing proportional parts of the different varieties and qualities, the warranty is that the whole quantity, if mingled together, would be of a quality equal to the sample. Leonard *v.* Fowler, 44 N. Y. 289.

The warranty is also limited to the condition of the article sold at the time of sale. Hall *v.* Plassan, 19 La. An. 11.

(*h*) Denton *v.* Great Northern Rail. Co., 5 Ell. & Bl. 867; 25 Law J., Q. B. 129.

1196 *False representation of authority(i)—Pretended agency—Deceit by agents.*—If the vendor of goods affirm that the goods he sells are the goods of a stranger, his friend, and that he had authority from him to sell them, and upon that *B* buys them, when, in truth, they are the goods of another, yet if he sell them falsely and fraudulently on this pretence of authority, though he do not warrant them, and though it be not averred that he sold them, knowing them to be the goods of the stranger, yet *B* shall have an action for this deceit(*k*). If an agent, who has no authority to make a contract in the name of his principal, and knows it, nevertheless makes the contract as having such authority, he is responsible in an action for deceit, for he induces the other party to enter into the contract on what amounts to a misrepresentation of a fact peculiarly within his own knowledge; and it is but just that he who does so should be considered as holding himself out as one having competent authority to contract, and as guaranteeing the consequences arising from any want of such authority. Where, also, a party making a contract, as agent, *bonâ fide* believes that he has authority, but has, in fact, no authority, he is still personally liable. It is a wrong, differing only in degree, but not in its essence, from the former case, to state as true what the individual making such statement does not know to be true, even though he does not know it to be false, but believes, without sufficient grounds, that the statement will ultimately turn out to be correct; and if that wrong produces injury to a third person, who is wholly ignorant of the grounds on which such belief of the supposed agent is founded, and who has relied on the correctness of the assertion, it is equally just that he who makes the assertion should be personally liable for its consequences(*l*). "One person may," observes Erle, J., "assert he has authority to make a contract on behalf of another, and *bonâ fide* believe it, and yet it may be deceit if he makes the positive assertion without disclosing the grounds on which he erroneously, as it turns out, believes it"(*m*).

Where, therefore, the defendant represented himself to be the agent of one Gardner, and as such authorized to let an estate to the plaintiff, and the defendant had no authority to let the property,

(i) Mere excess of authority does not constitute equitable fraud. Stewart v. Austin, L. R., 3 Eq. Ca. 299. Ship v. Crosskill, L. R., 10 Eq. Ca. 82.

(k) 1 Roll. Abr. 91, pl. 7.

(l) Alderson, B., Smout v. Ilbery, 10 M. & W. 9. Polhill v. Walter, 3 B. & Ad. 114.

(m) Jenkins v. Hutchinson, 13 Q. B. 748. Randell v. Trimen, 18 C. B. 786; 25 Law J., C. P. 307. Richardson v. Dunn, 8 C. B., N. S. 655; 30 Law J., C. P. 44.

although he believed that he had, and in consequence of that mistake the plaintiff was induced to lay out money upon the estate, relying on the representation, it was held that the defendant was liable for all the expenses incurred by the plaintiff on the strength of the representation(*n*). "I am of opinion," observes Willes, J., "that a person who induces others to contract with him as the agent of a third party, by an unqualified assertion of his being authorized to act as such agent, is answerable to the person who so contracts for any damages he sustains by reason of the assertion of the authority being untrue. This is not the case of a bare misstatement to a person not bound by any duty to give information. The fact that the professed agent honestly thinks that he has authority affects the moral character of his act, but his moral innocence, in so far as the person he has induced to contract is concerned, in no way aids him, or alleviates the inconvenience and damage which he sustains. If one of the two in such cases is to suffer, it ought not to be the person who has been guilty of no error, but he who, by an untrue assertion, believed and acted upon, as he intended it should be, and touching a subject within his peculiar knowledge, and as to which he gave the other party no opportunity of judging for himself, has brought about the damage. The obligation arising in such a case is well expressed by saying that the person professing to contract as agent for another impliedly undertakes with the person who enters into such a contract upon the faith of his being duly authorized, that the authority he professes to have does in point of fact exist"(*o*). Thus where a person lent money to a building society, and received a receipt signed by two directors, but the society had no power to borrow money, it was held that, by signing the receipt, the directors in effect represented that they had authority to make a valid contract of loan on behalf of the society, and that they were therefore personally liable to repay the money(*p*).

If the authority is of a public nature, or the grounds of it are known to the other contracting party, and the agent does no more than express his own opinion and belief as to the nature and extent of the authority vested in him, and manifests an intention merely to bind the principal if he has power so to do, and guards himself against any positive representation of authority, he will not then be responsible if

(*n*) Collen *v.* Wright, 8 Ell. & Bl. 647; 26 Law J., Q. B. 147; 27 ib. 215.
(*o*) Collen *v.* Wright, *supra*. Pow *v.* Davis, 1 B. & S. 220; 30 Law J., Q. B. 257.
(*p*) Richardson *v.* Williamson, L. R., 6 Q. B. 276. See Cherry *v.* Colonial Bank of Australasia, L. R., 3 P. C. Ca. 24. Leather *v.* Simpson, L. R., 11 Eq. Ca. 398.

it should turn out that he had not the power he was supposed to to possess(*q*).

A mistake made by an agent in describing the quantity of goods he has bought for his principal, or the time of their delivery, or the price to be paid for them, may render such agent liable to his principal for negligence or for a breach of duty(*r*), but does not render him liable to an action for deceit(*s*); it is otherwise, however, if he knowingly makes a false representation with intent to deceive his employer(*t*).

1197 *When a principal is responsible for the fraud of his agent.*—Deceits and frauds practiced by agents do not fall upon the principal, unless the principal adopts and takes the benefit of the fraudulent act with knowledge of the fraud(*u*), or unless the fraud was committed by the agent in the transaction of the ordinary business of the principal. The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service, and for the master's or principal's benefit, though no express command or privity by the master or principal be proved(*v*). Thus, a trustee who employs a solicitor to invest the money of the cestui que trust, is responsible if the solicitor fraudulently fabricates a surrender of copyholds by which the cestui que trust incurs loss(*x*). An exception to this rule occurs in the case of misrepresentation by directors of public companies, which do not render the company responsible in an action of deceit as for statements made by their authorized agents(*y*). "Where fraud has been committed, and a third person is concerned who was ignorant of the fraud, such third person is innocent of the

(*q*) Macgregor *v.* Deal and Dover Rail. Co., 22 Law J., Q. B. 69.

(*r*) See, per Blackburn, J., Ireland *v.* Livingston, L. R., 5 Engl. and Ir. App. 395.

(*s*) Thorn *v.* Bigland, 8 Exch. 729.

(*t*) Pewtriss *v.* Austen, 6 Taunt. 622.

(*u*) Addison on Contracts, 5th edit. 617-621. Udell *v.* Atherton, 7 H. & N. 181; 30 Law J., Exch. 337. Barry *v.* Croskey, 2 Johns. & Hem. 1. New Bruns. and Can. Rail. Co. *v.* Conybeare, *ante*, p. 1010. See Wilson *v.* Rankin, L. R., 1 Q. B. 162; and *post*, p. 1036.

(*v*) Barwick *v.* English Joint Stock Bk., L. R., 2 Exch. 259. Bennett *v.* Judson, 21 N. Y. 238. Mechanics' Bank *v.* New York & New Haven R. R. Co., 13 N. Y. 597. Smith *v.* Tracy, 36 N. Y. 79.

One of a firm of warehousemen falsely represented that a certain person had on storage with his firm a certain quantity of grain, and gave him the usual warehouse receipts therefor, on the faith of which a third party advanced money to the holder of the receipts. In an action against the firm for a conversion of the grain represented by the receipts, it was held that the plaintiff could recover; and that where an agent or partner makes a representation of a fact outside the terms of his power, and which, from its nature, rests peculiarly within his knowledge, upon the faith of which another party acts, the principal or firm is precluded from controverting the fact so alleged. Griswold *v.* Haven, 25 N. Y. 595.

A person may also become liable for the fraud of one who is not his agent by assuming the character of a principal and adopting the responsibility of his acts. Durst *v.* Burton, 47 N. Y. 167.

(*x*) Bostock *v.* Floyer, L. R., 1 Eq. Ca. 26. Sutton *v.* Wilders, L. R., 12 Eq. Ca. *acc.*

(*y*) Western Bank of Scotland *v.* Addie, *ante*, p. 1010.

fraud only so long as he does not insist upon deriving any benefit from it, but when once he takes the benefit he becomes a party to the fraud"(*z*) See *post*, 1036.

1198 *False assumption of authority, as between master and servant, employer and employed.*—Every man who employs another to do an act which the employer assumes to have, and appears to have, a right to authorize him to do, impliedly warrants that he has the authority he pretends to have, as the means of knowledge are peculiarly within his power; and if he has no such authority he is guilty of deceit, and must indemnify his servants or agents for all such wrongful acts as have been done by them in obedience to his commands, and which would have been lawful if the employer had the authority he pretended to have(*a*). If a landlord employs a bailiff, and represents that he has a right to distrain on a tenant for rent, and signs a distress-warrant, and delivers it to the bailiff to be executed, and it turns out that the landlord had no right to distrain, and the bailiff has to pay damages for the unlawful distress, he may maintain an action against the landlord for deceit, although the landlord made the representation believing it to be correct, and without any intention to deceive(*b*).

1199 *Counterfeiting trade-marks—Fraudulent use by one person of the trade-mark of another with intent to deceive.*—If a manufacturer has adopted a particular mark to denote that the goods so marked were made by him, and the mark has become known and understood in the trade, he who uses the mark for the purpose of deceiving purchasers and making them believe the goods to be the goods of the manufacturer who has introduced the mark, is guilty of a false and fraudulent representation, and if this produces damage to another, the person injured is entitled to an action for the deceit(*c*). Where "a clothier in Gloucestershire sold very good cloth, so that in London if they saw any cloth of his mark they would buy it without searching thereof; and another who made ill cloth put the Gloucestershire mark upon it, and an action was brought by him who bought the cloth for this deceit, it was adjudged maintainable"(*d*). The manufacturer, also, who is damnified in having goods fraudulently palmed upon the world as goods made by him when in truth they are not so, is also entitled to an action for the deceit(*e*). He does not in an action of this sort,

(*z*) Wood, V.-C., Scholefield *v.* Templer, 1 Johns. 162.
(*a*) Best, C.J., Adamson *v.* Jarvis, 4 Bing. 72.
(*b*) Rawlings *v.* Bell, 1 C. B. 959.
(*c*) Crawshay *v.* Thompson, 4 M. & Gr. 386, n.
(*d*) 33 Eliz. cited by Doddridge, J., Cro. Jac. 471.
(*e*) Doddridge, J., Poph. 142, 144.

claim any abstract right to the exclusive use of the mark in question. He merely says that, having adopted a particular mark to denote that the goods so marked were made by him, and the mark having become known and understood in the trade, the public were led to believe that goods so marked were of his manufacture, and that the defendant marked his goods with a mark resembling the plaintiff's mark with a view to deceive the public to purchase the same as and for the plaintiff's goods, and by reason thereof the plaintiff sustained damage(*f*).

1200 *Warranty of the genuineness of articles with trade-marks.*—By 25 & 26 Vict. c. 88, s. 19, it is enacted, that where any person shall sell, or contract to sell, to any other person, any chattel or article with any trade-mark thereon, or upon any thing together with which such chattel or article shall be sold, or contracted to be sold, the sale or contract to sell shall be deemed to have been made with a warranty by the vendor to the vendee, that every trade-mark upon such chattel or article, or upon any such thing sold therewith as aforesaid, was genuine and true, and not forged or counterfeit, and not wrongfully used, unless the contrary shall be expressed in some writing signed by, or on behalf of, the vendor, and delivered to and accepted by the vendee.

1201 *Warranty of description as to quantity or country.*—By s. 20, it is further enacted, that in every case in which any person shall sell, or contract to sell, to any other person, any chattel or article upon which, or upon any thing together with which, such chattel or article shall be sold, or contracted to be sold, any description, statement, or other indication of or respecting the number, quantity, measure, or weight of such chattel or article, or the place or country in which such chattel or article shall have been made, manufactured, or produced, the sale, or contract to sell, shall in every such case be deemed to have been made with a warranty by the vendor, to or with the vendee, that no such description, statement, or other indication was in any material respect false or untrue, unless the contrary shall be expressed in some writing signed by, or on behalf of, the vendor, and delivered to and accepted by the vendee.

By the 29 & 30 Vict. c. 37, s. 18, every person who shall sell any hops in a bag or pocket, having marked thereon any name, description, date, trade-mark, or symbol, intended to indicate the name of the grower, the place of growth, or the year when the hops were grown, shall be deemed to contract that the said description, etc., is genuine

(*f*) Rodgers *v.* Nowill, 5 C. B. 127.

and true, and in accordance with the provisions of the Act. And by s. 19, that in case of any person acting contrary to the provisions of the Act, the person aggrieved by the wrongful act shall be entitled to maintain an action for damages against the person doing or causing the doing of the wrongful act.

1202 *Fraudulent assumption of the name of a bank.*—Where the declaration in an action against a banking corporation stated that the plaintiff had established in the city of London a bank called the Bank of London, and had caused that name to be affixed on the offices of the bank, and had made the bank well known as the only Bank of London, and that the defendant, after the plaintiff's bank had been so established, and whilst it was the only bank styled the Bank of London, wrongfully established another bank in the city of London under the name of the Bank of London, and as representing the plaintiff's bank, and under the pretence that the bank so established was the plaintiff's bank, whereby the plaintiff was injured in his business, etc., it was held that the declaration disclosed no cause of action; but it seems to have been thought that, if it had been averred and shown that the plaintiff carried on the business of a banker under the name and style of the Bank of London, and that whilst he was so carrying on business the defendant came and established another bank of the same name, and carried on business under that name, for the purpose of making the public believe that the plaintiff's business was carried on at the defendant's bank, and so drew away customers from the plaintiff's bank, there would have been a good cause of action(*g*).

1203 *Deceit by provision-dealers in selling unwholesome food.*—Every dealer in provisions offered for sale as food for man, who knowingly sells corrupt and unwholesome food, whereby the plaintiff is injured, is liable to an action for deceit; but he cannot be made responsible in damages, unless it is shown that he sold it as sound and good meat, knowing it at the time to be unsound and unfit for food(*h*).

(*g*) Lawson *v.* Bank of London, 18 C. B. 84; 25 Law J., C. P. 188.

(*h*) Burnby *v.* Bollett, 16 M. & W. 644. Emmerton *v.* Matthews, 7 H. & N. 586; 31 Law J., Exch. 139. See French *v.* Vining, 102 Mass. 132.

In the sale of provisions for domestic use there is an implied warranty of their wholesomeness. Van Vrocklin *v.* Fonda, 12 Johns. 468. Emerson *v.* Brigham, 10 Mass. 197. Winsor *v.* Lombard, 18 Pick. 57, 62.

The circumstances attending the sale may be equivalent to a distinct affirmation on the part of the seller as to the quality of the thing sold. Thus, a grocer who sells at retail may be presumed to have some general notion of the uses which his customers will probably make of the articles which they buy of him. If they purchase flour or sugar, or other articles of daily domestic use for their families, or grain or meal for their cattle, the act of selling to them under such circumstances is equivalent to an affirmation that the things sold are, at least, wholesome, and reasonably fit for use; and proof that he knew at the time of the sale

1204 *False and fraudulent representations by married women and infants.*—Neither a married woman or her husband can be sued for a false and fraudulent representation by such married woman that she was a *feme sole*, whereby she induced the plaintiff to make a contract with her, which he could not enforce by reason of her being married(*i*). Nor can an infant be sued for a false and fraudulent representation that he was of full age, whereby the plaintiff was induced to contract with him(*k*). Nor for falsely affirming goods to be his own goods, and that he had a right to sell them, and thereby inducing the plaintiff to purchase them(*l*).

1205 *Fraudulent concealment.*—A *suppressio veri*, or concealment of the truth, will alone, in certain cases, and under certain circumstances, amount to a fraud, and give rise to an action for deceit. Where on the sale of a house, the seller, being conscious of a defect in a main wall, plastered it up and papered it over, it was held, that as the vendor had expressly concealed the defect, the purchaser might recover damages in an action for deceit(*m*). And where on a sale of goods the vendor knew that he had no title to the goods he sold, and failed to disclose the fact to the purchaser, it was held that the latter was entitled to maintain an action for damages "on the ground that he had been deceived, and was the worse for the deceit, and that he was entitled to recover to the extent to which he had been damnified by the decep-

that they were not wholesome and reasonably fit for use would be enough to sustain an action against him for deceit, unless he disclosed at the sale the condition of the goods sold. French v. Vining, 102 Mass. 132.

But when goods are sold as merchandise, to be sold again, there is no warranty that they are suitable for food. Hyland v. Sherman, 2 E. D. Smith (N. Y. C. P.), 284.

(*i*) Liverpool Adelphi Loan Assoc. v. Fairhurst. Wright v. Leonard, *ante*, p. 44.

(*k*) Johnson v. Pye, 1 Sid. 258. Bartlett v. Wells, 1 B. & S. 836; 31 Law J., Q. B. 57. Price v. Hewett, 8 Exch. 146. Brown v. McCune, 5 Sandf. 224. See Studwell v. Shapter, 54 N. Y. 249; Merriam v. Vaughn, 11 Cush. 40. To the contrary, see Fitts v. Hall, 9 N. H. 441.

(*l*) Grove v. Nevill, 1 Keb. 778.

(*m*) Anon. cited by Gibbs, J., Pickering v. Dowson, 4 Taunt. 785. Fraud may consist either in misrepresentation or concealment. Wintz v. Morrison, 17 Texas, 372. Belden v. Henriques, 8 Cal. 87. Devoe v. Brandt, 53 N. Y. 462.

The suppression of a fact material to be known in a transaction pending is equivalent to an assertion of falsehood. Aertsen v. Ridgway, 18 Ill. 23.

Thus, if the vendor of a horse knows that the animal has a latent defect which would not ordinarily be noticed by a purchaser of horses, and sells the horse without disclosing the defect, he is guilty of a fraudulent concealment. McAdams v. Cates, 24 Mo. 223. See Brown v. Gray, 6 Jones, Law (N. C.), 103.

So fraud on the part of the vendee in obtaining credit upon a purchase, may be based as well upon a suppression of the truth as upon proofs of the assertion of a falsehood. Devoe v. Brandt, 53 N. Y. 462. Nichols v. Michael, 23 N. Y. 264.

So where the holder of commercial paper, knowing of any fact showing that the maker is insolvent, sells the paper without disclosing that fact, he is guilty of a fraudulent concealment. Brown v. Montgomery, 20 N. Y. 287.

So if the vendor of sheep conceal the fact that they are infected with a contagious disease, he is liable in damages to the vendee for the fraud. Marsh v. Webber, 13 Minn. 109.

tion "(*n*). So, where an auctioneer sold a lease which he knew to have been forfeited in consequence of a breach of covenant by the lessee, and failed to disclose the forfeiture, and the plaintiff bought the lease in ignorance of the breach of covenant and forfeiture, it was held that the auctioneer had been guilty of a deceit, and was responsible in damages to the plaintiff (*o*).

If it is a custom of trade for a vendor of merchandise to disclose particular defects at the time of the sale, if he is cognizant of their existence, the vendor will be responsible in damages for a fraudulent concealment, if, knowing of the particular defect, he fails to make the customary disclosure(*p*). And if the vendor is cognizant of any serious secret defect materially deteriorating the value of the goods in the market, and nevertheless offers them for sale at the ordinary market price, and knows that the purchaser is deceived by the appearance of the goods at the time of the sale, and is laboring under a gross delusion respecting them, and the vendor takes no trouble to rectify the mistake and disclose the real facts to the purchaser, he is responsible in damages for wilful deceit(*q*). But if the defect is patent, and can readily be discovered by proper examination, and the purchaser has the means of examination at hand, there is no fraudulent concealment, and the maxim of *caveat emptor* will apply(*qq*). But the vendor must in no case resort to any art or contrivance to conceal a defect, for if he does he will be answerable, as we have just seen, for wilful deceit(*r*). "If I sell a horse that has lost an eye, no action lies against me for so doing; but if I sell him with a false and counterfeit eye, there an action lieth "(*rr*). If the vendor of a glandered horse has resorted to any doctoring or contrivance for the purpose of suppressing the marks of the disease, and has thereby deceived the purchaser, the latter will be entitled to recover all the damages he has sustained by the deception(*s*); but on a general sale of a horse, when there is no warranty, the rule of *caveat emptor* applies; and, except there be deceit, either by a fraudulent concealment or fraudulent misrepresentation, no action for unsoundness lies by the vendee against the vendor of the animal(*t*).

(*n*) Gibbs, C.J., Peto *v.* Blades, 5 Taunt. 659.
(*o*) Stevens *v.* Adamson, 2 Stark. 422.
(*p*) Jones *v.* Bowden, 4 Taunt. 846.
(*q*) Hill *v.* Gray, 1 Stark. 434. Paddock *v.* Strobridge, 29 Vt. 470.
(*qq*) Brown *v.* Gray, 6 Jones, Law (N. C.), 103.
(*r*) See Simmons *v.* Horton, 6 Jones, Law (N. C.), 278.
(*rr*) Southerne *v.* Howe, 2 Roll. 5.
(*s*) Mullett *v.* Mason, L. R., 1 C. P. 559.
(*t*) Hill *v.* Balls, 2 H. & N. 299; 27 Law J., Exch. 45.

1206 *Fraudulent concealment of the dangerous nature of articles delivered to a bailee to be warehoused or carried.*—Every person who conceals in boxes and packages articles known by him to be of an explosive, corrosive, or combustible and dangerous nature, and delivers them to another to be warehoused or carried with other goods by land or by sea, and fails to disclose the dangerous nature of the articles to the bailee, is guilty of a tortious act, and is responsible for all the consequences of his carelessness, unless the bailee knew of the dangerous nature of the articles, and the danger and risk attendant upon the receiving and deali with them. And it is no answer to aver that the articles were well known in trade and commerce, and that the plaintiff knew what they were, without an express averment that he knew them to be dangerous(*u*).

"It is clearly a tortious act," observes Crompton, J., "for the consequences of which shippers are responsible, to ship goods apparently safe and fit to be carried, and from which the shipowner is ignorant that any danger is likely to arise, without notice of such goods being dangerous, if the shipper is aware of such danger. Such shipment when the scienter is made out is clearly wrongful and tortious; but it does not seem that there is any authority decisive on the point as to whether the shipper is liable for shipping dangerous goods without a communication of their nature, when neither he nor the shipowner are aware of the danger. It seems very difficult to hold that the shipper can be liable for not communicating what he does not know. Lord Ellenborough's dictum(*x*) would tend to show that knowledge of the party shipping is an essential ingredient. I entertain great doubt whether either the duty or the warranty extends beyond the cases where the shipper has knowledge, or the means of knowledge, of the dangerous nature of the goods when shipped, or where he has been guilty of some negligence as shipper, as by shipping without communicating danger, which he had the means of knowing, and ought to have communicated"(*y*).

1207 *Fraudulent sales with all faults.*—A sale of a chattel to a purchaser "with all faults," does not mean that the purchaser is to take with it all frauds. Such a stipulation, therefore, will not protect the vendor from an action for deceit, if he has resorted to any artifice to conceal a defect, or has made use of any false representation for the purpose

(*u*) Hutchinson *v.* Guion, 5 C. B., N. S. 149; 28 Law J., C. P. 63. Farrant *v.* Barnes, 11 C. B., N. S. 553; 31 Law J., C. P. 139.

(*x*) Williams *v.* East, Ind. Co., 3 East, 192.

(*y*) Brass *v.* Maitland, 6 Ell. & Bl. 486. Gibbon *v.* Paynton, 4 Burr, 2298. Batson *v.* Donovan, 4 B. & Ald. 33, 37.

of lulling to sleep the vigilance of the purchaser. Therefore, where a ship was sold, to be taken as she lay with all faults, and it was proved that the vendor had used means to prevent purchasers from discovering certain defects in the vessel, and had also knowingly made a false representation of her condition at the time of the sale, it was held by Mansfield, C.J., that although the words "to be taken with all faults" were very large, and framed expressly to exclude the buyer from calling upon the seller for any defect in the things sold; yet if the seller was guilty of any positive fraud in the sale, either in the making a false representation or in using means to conceal a defect, the seller would be answerable in damages to the buyer for the deceit(*z*). And where the vendor of a vessel which was to be taken with all faults, represented the vessel in his handbills and advertisements of the sale to have been built in 1816, whereas she had been launched the year before, and the difference of time materially affected her value, it was held that the purchaser was entitled to recover damages for the deceit notwithstanding the stipulation that the vessel was to be taken with all faults. "The vendor," observes Abbott, C.J., "ought either to be silent or to speak the truth. In case he spoke at all he was bound to disclose the real fact"(*a*). "The meaning of selling with all faults," observes Heath, J., "is, that the purchaser shall make use of his eyes and understanding to discover what faults there are; but I admit that the vendor is not to make use of any fraud or practice to conceal a defect"(*b*).

A stipulation that the thing sold is to be taken with all faults, and without allowance for any defect, error, or misdescription, will protect the vendor from all unintentional mistakes, mis-statements, and misdescription(*c*), but not from the consequences of any wilful deception.

SECTION II.

OF ACTIONS FOR FRAUD AND DECEIT, AND THE REMEDY BY INJUNCTION.

208 *Actions for deceit—Parties to be made plaintiffs*(*d*).—The person to whom a false representation is made to be acted upon, and who acts

(*z*) Schneider *v.* Heath, 3 Campb. 507.
(*a*) Fletcher *v.* Bowsher, 2 Stark. 565. Baglehole *v.* Walters, 3 Campb. 154.
(*b*) Pickering *v.* Dowson, 4 Taunt. 784.
(*c*) Taylor *v.* Buller, 5 Exch. 779, 20 Law J., Exch. 21.
(*d*) See *ante*, pp. 1028, 1029.

upon it, believing it to be true, and who sustains damage thereby, is the party to sue for compensation; but an action may also be brought by a person to whom the representation is indirectly made, as where it is made to one man in order to be communicated to another. Where the father of the plaintiff told the defendant that he wanted to purchase a gun for the use of the plaintiff, and the defendant, in order to effect the sale, warranted the gun to have been made by Nock, and that it was a safe and secure gun, and the father then purchased the gun and delivered it to the plaintiff, who, on the faith of the warranty, and believing it to be true, used the gun, and was injured by its bursting in his hand, it was held that the plaintiff was entitled to sue the defendant for damages, as there was fraud, and damage the result of that fraud, not from an act remote and consequential, but from one contemplated by the defendant at the time as one of its results. "We decide," observes the court, "that the defendant is responsible in this case for the consequences of his fraud whilst the gun was in the possession of a person to whom his representation was either directly or indirectly communicated, and for whose use he knew the gun was purchased"(*e*). And where the defendant, in the course of a negotiation for the sale of a public-house, made a false and fraudulent representation to one Bourner as to the receipts of the house, and thereby induced Bourner to agree to buy it, and Bourner being unable to complete the purchase, got the plaintiff to take his contract off his hands by repeating to him the false representation made by the defendant, and the defendant then carried out the bargain with the plaintiff, and took the plaintiff's money, knowing that the false and fraudulent representation had been communicated to the plaintiff, and that he was acting under the influence of it, it was held that the plaintiff was entitled to sue the defendant for the deceit, although the false representation had not been made to him directly by the defendant, but through the medium of a third party. "The defendant," observes Bosanquet, J., "knowing that the fraudulent representation he had made to Bourner had been communicated to the plaintiff, with whom he was about to contract, and withholding an explanation or denial of Bourner's authority for the communication, and suffering the plaintiff on the faith of that communication to enter into the contract, was as much guilty of a deceit on the plaintiff as if he had in terms repeated the statement himself"(*f*).

(*e*) Langridge *v.* Levy, 2 M. & W. 532; 4 ib. 337. Blackmore *v.* Brist. and Ex. Rail. Co., 8 Ell. & Bl. 1052; 27 Law J., Q. B. 167. Farrant *v.* Barnes, *ante*, p. 1033.

(*f*) Pilmore *v.* Hood, 5 B. N. C. 109.

So, if the vendor of a lamp represents the lamp to be fit and proper to be used, knowing that it is not, and intending it to be used by the plaintiff's wife, or any particular individual, the wife, joining her husband for conformity, or that individual, will be entitled to an action for the deceit, upon the principle that if any one knowingly tells a falsehood with intent to induce another to do an act which results in his loss, he is liable to that person in an action for deceit(*g*).

1209 *Parties to be made defendants—Principal and agent.*—If a fraudulent act has been committed by an agent without the knowledge of the principal, and the latter afterwards adopts the act, and takes the benefit of the fraud, he will be responsible in damages to the person who has been deceived and injured by the fraudulent act(*h*). But if he repudiates the transaction as soon as he becomes acquainted with the fraud, and shuns all participation therein, he will not be responsible for the fraud, if it was committed by the agent without his sanction and authority, and the representation was not within the scope of the ordinary authority of an agent acting in such a matter(*i*). Where a merchant employed a factor to sell silk for him, and the factor fraudulently sold one sort of silk for another, "and the doubt was whether this deceit could charge the merchant," Holt, C.J., was of opinion that the merchant was answerable for the deceit of his factor, "though not *criminaliter* yet *civiliter;* for, seeing somebody must be a loser by this deceit, it is more reason that he that employs the deceiver should be a loser than a stranger"(*k*). "The principal and his agent are for this purpose completely identified"(*l*). The representation, if fraudulently made by the agent, within the scope of his authority, will bind the principal equally as if made by the principal(*m*). See *ante*, p. 1025.

A servant or agent of a horse-dealer employed to sell a horse and

(*g*) Longmeid *v.* Holliday, 6 Exch. 766. See George *v.* Skivington, L. R., 5 Exch. 1.

(*h*) Wright *v.* Crookes, 1 Sc. N. R. 685; 56 N. Y. 39. A *feme covert* is liable for fraud committed by her in dealing with her separate property, or by her husband, as her agent, to the same extent as individuals in all respects capable of acting *sui juris*. Rowe *v.* Smith, 45 N. Y. 230. Baum *v.* Mullen, 47 id. 577. But prior assent, advice or authorization by a wife, or passive acquiescence at the time, does not make her liable for a tort of her husband, in which she does not participate as an actor, and by which she is not profited, or her separate estate benefited.

(*i*) Grant *v.* Norway, 10 C. B. 668. Cornfoot *v.* Fowke, 6 M. & W. 369.

(*k*) Hern *v.* Nichols, 1 Salk. 289.

(*l*) Ld. Denman, C.J., Fuller *v.* Wilson, 3 Q. B. 67. Smith *v.* Tracy, 36 N. Y. 79. Bennett *v.* Judson, 21 N. Y. 238. Elwell *v.* Chamberlin, 31 N. Y. 611. Durst *v.* Burton, 47 N. Y. 167.

(*m*) Wilson *v.* Fuller, 3 Q. B. 1010. Taylor *v.* Green, 8 C. & P. 318. See Proudfoot *v.* Montefiore, L. R., 2 Q. B. 511; Morton *v.* Scull, 23 Ark. 289; McDonald *v.* Todd, 1 Grant's Cases (Penn.), 17; Union Bank *v.* Campbell, 4 Humph. 394.

receive the price, has an implied authority to warrant the horse(*n*); for in such a case there is an ostensible authority to do that which is usual in the conduct of the business of a horsedealer(*o*). But a servant of a private owner, employed on a particular occasion to sell a horse, has no such implied authority(*p*); à fortiori, therefore, a servant, who is merely employed to deliver the animal to a purchaser has not(*q*). If a broker who is authorized to advertise a ship for a voyage warrants, by his advertisement that she shall sail with convoy, the shipowners are bound by the warranty, although in giving it the broker may have exceeded his authority(*r*). If an agent employed by the indorsees of a bill to get it discounted, and not restricted as to the mode of doing it, warrants the bill to be a good bill, his employers are bound by the warranty(*s*).

1210 *Joint-stock companies.*—The shareholders of a joint-stock company cannot be made individually responsible in damages in an action for deceit, for adopting and authorizing the publication of a false and fraudulent report respecting the pecuniary state and condition of the company, unless it be proved that the report has been signed by them (*ante*, p. 1010), and was false to their knowledge at the time they attached their signatures to it(*t*); but the company itself may be made responsible for fraud through the medium of acts done by the managers and shareholders in the management of its concerns. If, with a view to raise the marketable value of the shares of a tottering and insolvent company, a report, fraudulently misrepresenting the real state of the concern, the real amount of its assets, and of the demands upon it, is received and adopted by the shareholders at a general meeting, and promulgated and published to the world to induce strangers to come forward and invest capital in the concern, this must be taken as between the company and third persons, who receive and act upon the report to their detriment, to be a representation by the company: "otherwise companies of this sort would be

(*n*) Alexander *v.* Gibson, 2 Campb. 555; 5 Sup. Ct. 51. Williamson *v.* Canaday, 3 Ired. 349; Lane *v.* Dudley, 2 Murph. 119. Marcle *v.* Haskins, 27 Ill. 382. Ezell *v.* Franklin, 2 Sneed (Tenn.), 236.

(*o*) Howard *v.* Sheward, L. R., 2 C. P. 148.

(*p*) Brady *v.* Todd, 9 C. B., N. S. 592; 30 Law J., C. P. 228.

(*q*) Woodin *v.* Burford, 2 Cr. & M. 392.

(*r*) Rinquist *v.* Ditchell, 2 Campb. 556, n.

(*s*) Fenn *v.* Harrison, 4 T. R. 177. Ferguson *v.* Hamilton, 35 Barb. 427.

But one employed to make a sale of bank stock is not presumptively empowered to warrant it in the name of his principal. An agent with express authority to sell has no implied authority to warrant where the property is of a description not usually sold with warranty. Smith *v.* Tracy, 36 N. Y. 79.

(*t*) Barry *v.* Croskey, 2 Johns. & H. 27.

in this extraordinary predicament that they might employ, nay, must employ agents to carry on their concerns, and those agents, with the authority of the company, might make representations, be they ever so false and ever so fraudulent, and yet, nevertheless, the company may benefit by those misrepresentations without being at all liable to be told, That is your fraud "(*u*).

But the representation in these cases must be within the scope and authority of the person making it; for where a representation on behalf of a public company was made by the mere law agent or solicitor of the company, who was acting *ultra vires* when he made the representation, the company was held not to be bound by his act(*x*).

1211 *Of declarations for deceit.*—It is not necessary, in a declaration for a deceitful representation, to set out the representation in the precise words in which it was made. It is enough to state the substance and effect of it(*y*). This is the case with declarations for the assertion of

(*u*) Glasgow Natl. Exchange Co. *v.* Drew 2 Macq. 124. See, however, West. Bank of Scotland *v.* Addie, *ante*, p. 1010, 1027.

(*x*) Burnes *v.* Pennell, 2 H. L. C. 497, cited 2 Macq. Sc. A. 125.

(*y*) Gutsole *v.* Mathers, 1 M. & W. 506. Cutler *v.* Adams, 15 Vt. 237. Under the Missouri practice it is not necessary to set out in the complaint the history and details of the fraud. A general averment of fraud is sufficient. Fox *v.* Webster, 46 Mo. 181.

A declaration in an action on the case for deceit, should set out with reasonable certainty, not only what the fraud was by which the plaintiff was injured, but also the connection between the fraud and the damage in order that the court may see that one might have resulted directly from the other. Byard *v.* Holmes, 34 N. J. Law, 296.

A party relying upon fraud to support his cause of action, must set up the specific facts which constitute the fraud. Capuro *v.* Builders' Insurance Co., 39 Cal. 123.

A general allegation of fraud is insufficient in Minnesota, and the material facts constituting the fraud must be stated, but not the evidence of such facts. Cummings *v.* Thompson, 18 Minn. 246.

The complaint in an action for deceit or fraud in the purchase or sale of property induced or procured by false representations, must in substance state the representations, and aver their falsity, and that they were made with intent to deceive the plaintiff and induce him to make the purchase or trade, and that they did induce such trade to the defendant's injury. Barber *v.* Morgan, 51 Barb. 116.

The plaintiff must allege that the defendant knew that the representations made by him were false. Mizell *v.* Sims, 39 Miss. 331. Bond *v.* Clark, 35 Vt. 577. Pettigrew *v.* Chellis, 41 N. H. 95. Wootten *v.* Callahan, 26 Ga. 366. Moore *v.* Noble, 53 Barb. 425.

An allegation in the complaint that the defendant "falsely and fraudulently represented" is a sufficient statement of a *scienter*. Thomas *v.* Beebe, 25 N. Y. 244. Terrell *v.* Bennett, 18 Ga. 404.

In an action for a false warranty, a *scienter* need not be averred. Schuchard *v.* Allens, 1 Wall. (U. S.) 359. Booth *v.* Northrop, 27 Conn. 325. Holman *v.* Dord, 12 Barb. 336.

Fraud may be based upon a warranty or upon representations, or upon both together; and the pleader may, in the proper case, either set up facts showing a breach of contract of warranty, or showing a case of fraud at his election. But where the gravamen of the complaint is fraud, the plaintiff cannot recover on proof of a breach of the contract of warranty only; Rose *v.* Mather, 51 N. Y. 108. Moore *v.* Noble, 53 Barb. 425.

For the distinction between a declaration or complaint setting up a cause of action for fraud and deceit, and a declaration or complaint setting up a breach of warranty, and the proof requisite to sustain either cause of action, see Rose *v.* Mather, 51 N. Y. 108; Moore *v.* Noble, 53 Barb. 425; Mahwin *v.* Harding, 8 Foster (N. H.), 128.

a false claim of lien by the defendant upon the plaintiff's goods(z); a false assumption of authority to accept bills by procuration(a); a false assumption of title to goods(b); false representations by railway companies as to the time of the starting of their trains(c); by managing directors of joint-stock companies as to the amount of dividend guaranteed to the shareholders(d); by secretaries of insurance companies as to the management and financial condition of the company(e); false representation of authority to distrain(f); false representations that the patterns and designs of silk goods had been copied from registered patterns(g); false representations as to the character, credit and circumstances of third parties(h); or of a firm or company of which the party making the representation is a member(i); false representations by agents of the sums due to them from their principals(k); false representations of the character, quality, or make of goods through the medium of counterfeit trade-marks and labels(l); and false assumption of agency and of authority to order goods on behalf of a named principal.

1212 *Declarations for a breach of warranty on the sale of a horse* set forth "that the defendant, by warranting a horse to be then sound and quiet to ride, sold the horse to the plaintiff, yet the said horse was not then sound and quiet to ride"(m). A declaration which stated, that in consideration that the plaintiff, at the request of the defendant, *had* bought a horse of the defendant, the defendant promised that the horse was sound, was held bad in arrest of judgment, as setting forth a warranty after a sale, and not a sale founded upon and induced by a warranty(n).

1213 *Declaration by an agent against a principal for a false representation.*—Where a declaration stated that the defendant, being possessed of

(z) Green v. Button, 2 C. M. & R. 707.
(a) Polhill v. Walter, 3 B. & Ad. 114.
(b) Dyster v. Battye, 3 B. & Ald. 448.
(c) Denton v. Gt. North. Rail. Co., 5 Ell. & Bl. 860; 25 Law J., Q. B. 129.
(d) Gerhard v. Bates, 2 Ell. & Bl. 479.
(e) Pontifex v. Bignold, 3 Sc. N. R. 390.
(f) Rawlings v. Bell, 1 C. B. 951.
(g) Barley v. Walford, 9 Q. B. 199.
(h) Corbett v. Brown, 8 Bing. 33. Tatton v. Wade, 18 C. B. 371. Swann v. Phillips, 8 Ad. & E. 457.
(i) Devaux v. Steinkeller, 3 Sc. 202.
(k) Pewtriss v. Austen, 6 Taunt. 522. As to declarations against persons who have contracted as agents without authority, see Randell v. Trimen, 18 C. B. 786; *ante*, p. 1025.
(l) Morison v. Salmon, 2 Sc. N. R. 449. Crawshay v. Thompson, 4 M. & Gr. 357; 5 Sc. N R. 562. Rodgers v. Nowill, 5 C. B. 109. Blofeld v. Payne, 4 B. & Ad. 410. Sykes v. Sykes, 3 B. & C. 541.
(m) 15 & 16 Vict. c. 76, Sched. B.
(n) Roscorla v. Thomas, 3 Q. B. 236. Holt, C.J., Lysney v. Selby, 2 Ld. Raym. 1120.

certain cattle, represented to the plaintiff that he, the defendant, was entitled to sell the said cattle, and requested the plaintiff to put them up to auction, and the plaintiff, confiding in the representation, sold the cattle by auction, and, after deducting the expenses of the sale, paid over the purchase-money to the defendant, whereas the defendant was not entitled to sell the cattle, and afterwards the true owner brought an action against the plaintiff, and recovered 1100*l.* damages and 95*l.* costs, which the plaintiff was obliged to pay, together with 300*l.*, his own costs of defending the action, whereupon the plaintiff requested the defendant to pay him the amount of the said damages and costs, but the defendant refused, it was held that the declaration disclosed a good cause of action(*o*).

1214 *Declarations for fraudulently inducing an architect* to withhold his certificate of the completion of certain work, and thereby preventing the plaintiff from recovering his stipulated remuneration, should set forth that the plaintiff had done all things necessary to entitle him to the certificate, and that he had completed the work to the satisfaction of the architect, and that the architect with full knowledge thereof fraudulently neglected to certify in collusion with and by the procurement of the defendant(*p*).

1215 *Of the plea of not guilty.*—Where an action was brought against the defendant for selling a certain lease, and certain fixtures and goodwill, for a larger price than they were worth, by means of a false and fraudulent representation, it was held that the plea of not guilty put in issue the sale by means of the fraudulent representation, and that the plaintiff was bound to prove both the sale and the misrepresentation(*q*). And where the wrongful act complained of was, that the defendant represented himself to be the agent of the master of a vessel, and thereby induced the plaintiffs to enter into a charter-party with him, when in fact he was not such agent, and had no authority to charter the vessel, it was held that the plea of not guilty put in issue both the fact of the misrepresentation and the fact of the making of the charter-party, the two facts together constituting the cause of action(*r*). Where the scienter is the gist of the action, it is put in issue by the plea of not guilty(*s*).

Under the plea of not guilty, the defendant may show that the

(*o*) Adamson *v.* Jarvis, 4 Bing. 69; 12 Moore, 241.
(*p*) Batterbury *v.* Vyse, 2 H. & C. 42; 32 Law J., Exch. 177.
(*q*) Mummery *v.* Paul, 1 C. B. 326.
(*r*) Brink *v.* Wingnard, 2 C. & K. 667.
(*s*) Thomas *v.* Morgan, 2 C. M. & R. 496.

representation is within the 9 Geo. 4, c. 14, s. 6 (*ante*, p. 1006), and that it was not made by writing signed by the defendant(*t*).

1216 *Proof of fraudulent misrepresentation and deceit.*—"It is settled law," observes Parke, B., "that, independently of duty, no action will lie for a misrepresentation, unless the party making it knows it to be untrue, and makes it with a fraudulent intention to induce another to act on the strength of it, and to alter his position to his damage"(*u*). In order, therefore, to maintain an action for deceit arising from a false and fraudulent misrepresentation, it must be proved either that the defendant knew his statement to be untrue (*ante*, p. 1004), or that he pretended to a knowledge which he must have known that he did not possess at the time he made the representation (*ante*, p. 1006), or that he stated a fact to be true for a fraudulent purpose(*x*), and that he made it with the intention that the plaintiff should, either directly or indirectly, come to the knowledge of it, and act upon it.

1217 *Proof of the representation having been made to the plaintiff.*—Public announcements and representations issued by the authority and under the direction of the directors or managers of public companies, and intended by them for general circulation in share-markets, and amongst purchasers of shares, are deemed in contemplation of law, as we have seen, to be made to all persons who desire to have dealings with the company, and to become purchasers of shares. The allegation in a declaration that the representation was made to the plaintiff is completely proved by showing that it was contained in a report or prospectus, published by the defendants, and sold or distributed by them, for the purpose of influencing the sale of shares and being perused by persons desirous of buying shares, and that the plaintiff perused it, and was induced by the statements and representations contained in it to buy shares(*y*).

1218 *Proof that the plaintiff relied upon the representation, and not upon his own examination and judgment.*—"Cases frequently occur in which, upon entering into contracts, misrepresentations made by one party are not in any degree relied upon by the other party. If the party to whom the representations were made, himself resorted to the proper means of verification before he entered into the contract, it may appear that he relied upon the result of his own investigation and

(*t*) Turnley *v.* Macgregor, 6 M. & Gr. 46.

(*u*) Thom *v.* Bigland, 8 Exch. 731. Childers *v.* Wooler, 2 Ell. & Ell. 287.

(*x*) Taylor *v.* Ashton, 11 M. & W. 415. Marsh *v.* Falker, 40 N. Y. 562. Chester *v.* Comstock, 40 N. Y. 575. Wakeman *v.* Dalley, 51 N. Y., 27. Meyer *v.* Amiden, 45 N. Y. 169. Oberlander *v.* Spiess, 45 N. Y. 175. Hubbell *v.* Meigs, 50 N. Y. 480.

(*y*) Scott *v.* Dixon, 29 Law J., Exch. 62, n. Bedford *v.* Bagshaw, ib. 64; *ante*, p. 1010.

inquiry, and not upon the representations made by the other party; or if the means of investigation and verification be at hand, and the attention of the party receiving the representations be drawn to them, the circumstances of the case may be such as to render it incumbent upon a court of justice to impute to him a knowledge of the result which, upon due inquiry, he ought to have obtained, and thus the notion of relying upon the representations made to him may be excluded. Again, when we are endeavoring to ascertain what reliance was placed on representations, we must consider them with reference to the subject-matter and the relative knowledge of the parties. If the subject is capable of being accurately known, and one party is, or is supposed to be, possessed of accurate knowledge, and the other is entirely ignorant, and a contract is entered into after representations made by the party who knows, or is supposed to know, without any means of verification being resorted to by the other, it may well enough be presumed that the ignorant man relied on the statements made by him who was supposed to be better informed; but if the subject is in its nature uncertain, if all that is known about it is matter of inference from something else, and if the parties making and receiving representations on the subject have equal knowledge, and means of acquiring knowledge, and equal skill (see *ante*, p. 1016), it is not easy to presume that representations made by one would have much influence upon the other"(*z*).

Cases frequently occur in which it appears that a contract was entered into after erroneous representations made by one party, and yet without the other party having at all relied upon those erroneous representations(*a*).

In an action for damages for a false representation by the defendant that he was authorized to accept a bill of exchange in the name of a public company, and to bind the company by the acceptance, the plaintiff must prove that he has sustained some actual pecuniary damage from the false representation. The mere fact of the bill coming into the plaintiff's hands does not *per se* import damage, as the plaintiff may have received the bill without having given any consideration for it(*b*).

(*z*) The Master of the Rolls, Clapham *v.* Shillito, 7 Beav. 149.

(*a*) Shrewsbury *v.* Blount, 2 Sc. N. R. 594. Holt, C.J., Lysney *v.* Selby, 2 Ld. Raym. 1120. It must be alleged and proved that the plaintiff relied upon the false representations in order to support an action for deceit. Goings *v.* White, 33 Ind. 125.

(*b*) Eastwood *v.* Bain, 3 H. & N. 738; 28 Law J., Exch. 74; 7 W. R. 90. Fraud is not actionable unless it causes damage. Nye *v.* Merriam, 35 Vt. 438. Castleman *v.* Griffin, 13 Wis. 587. Marsh *v.* Falker, 40 N. Y. 562, 573.

1219 *Proof of warranties.*—Although a warranty made orally on the completion of a written contract cannot be introduced as part of the contract, if the contract is silent as to the fact of the warranty(*c*), yet, if it can be shown that the warranty or representation was false to the knowledge of the person making it, and therefore fraudulent, it may be given in evidence as a circumstance collateral to the contract, and may be made the foundation of an action for deceit(*d*): for wherever a written contract or undertaking has been procured through the medium of falsehood and fraud, the fact may be proved by oral testimony, notwithstanding the existence of a writing embodying the terms of the bargain, but making no mention of the false representation(*e*).

An unstampted written agreement may be given in evidence to prove fraud, if it is used merely for the purpose of showing that a person paying money has been imposed upon(*f*).

1220 *Proof of the terms and conditions of warranty by proof of public notices stuck up in an auction-room or repository where the thing warranted was sold.*—If in an auction-room, or at a repository established for the sale of horses, the rules or conditions of sale are painted up in legible characters in a conspicuous position, the purchaser will be deemed to have had notice of the regulations, and will be bound by them, unless the vendor has resorted to some misrepresentation or contrivance to prevent the purchaser from reading them. And if by these rules or conditions it is stipulated that a warranty of soundness shall remain in force for a given period only, unless in the meantime a certificate of unsoundness is procured from a veterinary surgeon, the purchaser must comply with the stipulation, or lose his remedy upon the warranty(*g*).

1221 *Evidence of the breach of warranty of a horse—What constitutes unsoundness.*—"The rule as to unsoundness," observes Parke, B., "is, that if at the time of the sale the horse has any disease, or has undergone any alteration of structure either from disease or accident, which actually does diminish the natural usefulness of the animal, so as to make him less capable of work of any description, or which in its ordinary progress, or from its ordinary effects, will diminish the natural usefulness of the animal, such horse is unsound. I think the word

(*c*) Addison on Contracts, 6th ed., pp. 19, 220. Randall *v.* Rhodes, 1 Curtis C. C. 90. See Sparks *v.* Messick, 65 N. C. 440.

(*d*) Dobell *v.* Stevens, 3 B. & C. 623. Meyer *v.* Everth, 4 Campb. 22. Wright *v.* Crookes, 1 Sc. N. R. 685. Hutchinson *v.* Morley, 7 Sc. 341. Canham *v.* Barry, 15 C. B. 597; 24 Law J., C. P. 100.

(*e*) Davis *v.* Symonds, 1 Cox, Eq. Ca. 405.

(*f*) Holmes *v.* Sixsmith, 7 Exch. 807.

(*g*) Bywater *v.* Richardson, 1 Ad. & E. 508. Meanard *v.* Aldridge, 3 Esp. 271.

'sound' means, that the animal is free from disease at the time he is warranted. If we once let in considerations of the slightness of the disease and facility of cure, where are we to draw the line? A horse may have a cold, which may be cured in a day; or a fever, which may be cured in a week or month; and it would be difficult to say where to stop. Of course, if the disease be slight, the unsoundness is proportionally so, and so also ought to be the damages"(*h*). Convexity of the cornea, rendering a horse shortsighted, and causing him to shy, is unsoundness(*i*). It is not enough for the plaintiff to give evidence inducing a suspicion that the horse was unsound at the time of the warranty. If he only throws the soundness into doubt he is not entitled to recover(*k*).

1222 *Proof of manifest defects not covered by the warranty.*—If the defendant can prove that the defect complained of by the plaintiff was a manifest defect obvious to all oberverS, and that the plaintiff examined the horse, and knew of the defect at the time he bought the animal, the defect will be excluded from the warranty (*ante*, p. 1016). If the horse was naturally ill-formed from turning out one of its fore-legs, so as to be incapable of doing much work without cutting the ankle with the shoe so as to produce lameness, this is not unsoundness, rendering the vendor liable in damages for a breach of warranty(*l*). The peculiar form of hock called "curby hock," which is a natural defect, is not an unsoundness, if it has not occasioned lameness up to the time of the sale, although such horses are very liable to throw out a curb, and become lame(*m*). But bone spavin in the hock is unsoundness, although it may not produce lameness for years(*n*). A natural malformation of the animal, constituting a patent defect visible to the eye of every observer, must be taken to be known to a purchaser who has examined the horse, and he will be deemed to have bargained for the warranty of soundness subject to the patent defect (*ante*, p. 1016); but if the defect is not obvious, it must be proved that the purchaser was cognizant of it at the time he purchased, for the very fact of the warranty having been given would tend to throw him off his guard, and prevent him from making a close examination of the animal(*o*).

(*h*) Kiddell *v.* Burnard, 9 M. & W. 669. See Foudren *v.* Durfree, 39 Miss. 324; Herndon *v.* Bryant, id. 335; Thompson *v.* Bertrand, 23 Ark. 730.
(*i*) Holyday *v.* Morgan, 28 Law J., Q. B. 9.
(*k*) Eaves *v.* Dixon, 2 Taunt. 343.
(*l*) Alderson, J., Dickinson *v.* Follett, 1 M. & Rob. 300.
(*m*) Brown *v.* Elkington, 8 M. & W. 132.
(*n*) Watson *v.* Denton, 7 C. & P. 85.
(*o*) Holyday *v.* Morgan, 28 Law J., Q. B. 9.

1223 *Proof of vice.*—If a horse has been warranted free from vice, and the horse is proved to be a crib-biter, the warranty is broken. "The habit of crib-biting," observes Parke, B., "may not indeed show vice in the temper of the animal, but as it is a habit decidedly injurious to its health, and tending to impair its usefulness, it comes within the meaning of the term vice"(*p*).

1224 *Proof of the use of counterfeit trade-marks.*—In actions for damages for the fraudulent use by the defendant of the plaintiff's trade-mark, it is necessary to prove that the plaintiff, being a manufacturer, has been accustomed to use a certain mark to denote that the goods so marked were of his manufacture, that such mark was well known and understood in the particular trade, and that the defendant had adopted the mark, and sold goods bearing such mark upon them, as and for the plaintiff's goods, with intent to deceive(*q*). It must be proved that the mark closely resembled the plaintiff's mark, and that it was used by the defendant to enable him to pass off his own goods as being of the plaintiff's make(*r*).

1225 *Remedies in equity for a false representation.*—Where a false representation is made by one man to induce another to enter into a contract, and the person making the representation is no party to the contract, the Court of Chancery will compel the latter to make good his assertion as far as possible. The principle of equity, that where a person by misrepresentation draws another into a contract, such person shall be compelled, if possible, to make good the representation, applies not merely to cases where the statements were known to be false by those who made them, but to cases where statements, false in fact, were made by persons who believed them to be true, if in the due discharge of their duty they ought to have known, or if they had formerly known, and ought to have remembered, the fact which negatives the representation(*s*). The principle is this, that a representation made by one party for the purpose of influencing the conduct of another, and acted on by him, will in general be sufficient to entitle him to the assistance of a Court of Equity for the purpose of realizing such representation(*t*). And it seems that in many cases of false and

(*p*) Scholefield *v.* Robb, 2 M. & Rob. 210.
(*q*) Wilde, C.J., Rodgers *v.* Nowill, 5 C. B. 125.
(*r*) Crawshay *v.* Thompson, 4 M. & Gr. 357; 5 Sc. N. R. 562. Morison *v.* Salmon, 2 Sc. N. R. 432. See Seixo *v.* Provezende, *post*, 1052.
(*s*) Pulsford *v.* Richards, 17 Beav. 94.
(*t*) Per Stuart, V.-C., Thomson *v.* Simpson, L. R., 9 Eq. Ca. 506.

fraudulent representation, the remedy by action at common law for damages, and by bill in equity, is concurrent(*u*).

1226 *Of the damages recoverable in actions for fraudulent misrepresentation and deceit.*—Damages are, as we have seen, recoverable from every defendant who has knowingly made a false statement to the plaintiff, with an intention that he should act upon it in reliance upon its truth, and the plaintiff has acted upon it, and been damnified; for "wherever a man wickedly asserts that which he knows to be false, and thereby draws his neighbor into a heavy loss, he is responsible for it, or for so much of the loss as was the necessary, natural, or probable and known consequence of the misrepresentation "(*x*). Damages also are recoverable, as we have seen, from persons who represent that to be true within their own knowledge which they do not know to be true, and so induce others to act upon the faith of the representation, and sustain damage (*ante*, pp. 1006, 1015), more particularly in those cases where the means of knowing the truth of the matter rest peculiarly or exclusively with the persons making the representation (*ante*, pp. 1015, 1016). If a man assumes to be an agent when he is not so, he must answer for any damage which is the natural and direct result of confidence being given to the representation of authority. If he believed that he had authority to contract as agent when he had not, he is answerable for the consequences in an action of contract. If he knew that he had no authority, he is then responsible in an action for deceit(*y*).

1227 *Special damages—Breach of warranty.*—If special damages have been sustained by reason of the misrepresentation and deceit, or breach of warranty, of a vendor, they may be recovered from the latter, if the plaintiff has claimed them in his declaration. Where a cable was warranted sound, and a purchaser, relying on the warranty, attached an anchor to the cable, and the cable was unsound and broke, and the purchaser lost his anchor, it was held that the value of the anchor might be recovered in addition to the price paid for the cable, but that the plaintiff must expressly claim it in his declaration(*z*). But the damages must be such as may fairly and reasonably be considered in the ordinary course of things to be the probable result of the plaintiff's

(*u*) Ramshire *v.* Bolton, L. R., 8 Eq. Ca. 294; 38 Law J., Ch. 594. Leather *v.* Simpson, L. R., 11 Eq. Ca. 398.

(*x*) Pasley *v.* Freeman, 3 T. R. 65. See *ante*, pp. 35, 1004.

(*y*) Collen *v.* Wright, 7 Ell. & Bl. 314. Randell *v.* Trimen, 18 C. B. 786; 25 Law J., C. P. 307. Simons *v.* Patchett, 7 Ell. & Bl. 568; 26 Law J., Q. B. 195.

(*z*) Borradaile *v.* Brunton, 2 Moore, 582; 8 Taunt. 535. As to damages recoverable for breach of warranty, see Addison on Contracts, 6th edit., pp. 1075, 1077.

acting on the faith of the representation or warranty. If there are special circumstances rendering the misrepresentation or deceit peculiarly injurious to the plaintiff, the defendant will not in general be responsible for the increased damages resulting therefrom, unless the special circumstances were known to him at the time of the making of the representation(*a*). However, there is a destinction, it seems, between an action on a breach of warranty and one for fraudulent misrepresentation; for damage which may be the necessary or probable result of a false representation would not necessarily be within the contemplation of the parties on a warranty(*b*).

1228 *Special damages—False assumption of agency.*—Where the defendant, a land agent, professed that he had, and supposed that he had, authority from a landlord to let an estate, and thereupon entered into an agreement in writing with the plaintiff, whereby he professed to bind the landlord to grant the plaintiff a lease of the estate for twelve years, and the plaintiff, supposing that the defendant had the authority he pretended to have, entered upon the land, and bought and paid for the straw and manure, and expended considerable sums in preparing the land for cultivation, and the landlord then refused to grant the lease on the ground that the defendant was not authorized to let the land on the terms of the agreement, and the plaintiff, relying on the representation of authority that had been made by the defendant, instituted a suit in the Court of Chancery to enforce a specific performance of the agreement, and gave notice to the defendant of the institution of the suit, and that the landlord defended on the ground that the defendant had no authority to sign the agreement on his behalf, and that if the suit failed from want of authority the plaintiff would look to the defendant for costs, and the defendant did not withdraw his assertion of authority, but said he would resist any demand the plaintiff might have against him, and the suit went on, and it was established that the defendant had no authority to let the land on the terms specified, and the plaintiff had to pay the costs of the suit, it was held that he was entitled to recover these costs from the defendant, as well as the expenses he had incurred in preparing the land for cultivation(*c*). So, in such a case, he would be entitled to recover the estimated value of the lease; but not expenses incurred

(*a*) Hadley *v.* Baxendale, 9 Exch. 341; 23 Law J., Exch. 179. Portman *v.* Middleton, 4 C. B., N. S. 322; *post*, ch. 22, s. 1.

(*b*) Mullett *v.* Mason, L. R., 1 C. P. 559.

(*c*) Collen *v.* Wright, 8 Ell. & Bl. 647; 26 Law J., Q. B. 147; 27 lb. Exch. 217. See Hughes *v.* Græme, 33 Law J., Q. B. 335.

by reason of his having resold his interest in the lease to a third party without notice to the defendant, such damages not necessarily or naturally resulting from the wrongful act of the defendant, but from the fact that the plaintiff had chosen to resell his interest(*d*). So, where the defendant, a joint owner of an estate, contracted, without authority from his co-owners, to sell it to the plaintiff, and on their failure to complete the sale the plaintiff sued them and failed, it was held that the plaintiff was entitled to recover from the defendant all costs, up to the time when it appeared that the defendant had no such authority, as well as the expenses he had incurred in the investigation of title, and the difference between the contract price and market price of the estate, but not losses he had incurred on the re-sale of stock bought for the purpose of stocking the land, as that was not shown to have been in contemplation of the parties at the time of the sale(*e*).

1229 *Prevention of fraud by indictment(f).*—All deceitful practices for defrauding, or endeavoring to defraud, another of his just rights by means of some artful device, or fraudulent contrivance, are punishable as misdemeanors at common law. Persons have been indicted and convicted for playing with false dice; also for causing an illiterate person to execute a deed to his prejudice by reading it over to him in words different from those in which it was written; also for persuading a woman to execute writings on her marriage as being a settlement of her property upon her, but which constituted an acknowledgement of a debt with a warrant of attorney to enter up judgment(*g*). Where a man went about the country and offered blacking for sale as "Everett's Premier," representing it to be a well-known article of that name, but knowing that it was not so, and intending to cheat his purchasers by palming off upon them a spurious article as the true one, it was held that he was indictable for a misdemeanor(*h*).

1230 *Indictments for obtaining, or endeavoring to obtain, money or goods by false pretences.*—Shopkeepers also have been indicted and convicted for obtaining or endeavoring to obtain, money from their customers by false pretences, by preparing and selling spurious articles fraudulently represented by them to be genuine, in order that by means of the counterfeit they might obtain the price of the genuine article. This

(*d*) Spedding *v.* Nevell, L. R., 4 C. P. 212.
(*e*) Godwin *v.* Francis, L. R., 5 C. P. 295.
(*f*) By the Merchandise Marks Act, 1862, 25 & 26 Vict. c. 88, the fraudulent use of trademarks is made a misdemeanor. See ss. 2, 3, 12, 13.
(*g*) Hawkins' Pleas of the Crown, ch. 71.
(*h*) Reg. *v.* Dundas, 6 Cox, Cr. C. 380.

was the case where a tradesman prepared some baking powders of his own manufacture, and put them into printed wrappers and represented them to be the baking powders of a celebrated manufacturer, and sold them and received the money for them as such(*i*); where a shopkeeper obtained the price of silver for base metal, by knowingly and fraudulently representing an article of base metal sold by him to be silver(*k*); where dealers in wares and merchandise knowingly and fraudulently misrepresented the quantity or weight of articles of merchandise, delivered by them to the order of a purchaser, for the purpose of obtaining, or who thereby obtained from such purchaser, the price of a larger quantity of goods than had been actually delivered(*l*).

But a mere misrepresentation, at the time of a sale, of the quality of the goods sold, if it amounts only to a vaunting or exaggerated statement of the value of the article—the high-flown praise often bestowed by a vender on the wares he sells—will not amount to an indictable offence, as where the vendor of spoons represented that they were "equal to Elkinton's A"(*m*). But where the vendor of a gold chain falsely represented that it was 15-carat gold, when it was in reality only 6-carat gold, and the vendor knew it, his conviction was affirmed(*n*).

Various statutes have been passed for the repression of fraud, and the punishment of persons who obtain money, goods, or securities under false pretences(*o*); but "these statutes," observes Pollock, C.B., "were never, in my opinion, meant to apply to a mere fraud committed in the course of a mercantile transaction, and to make it the subject of an indictment, unless the matter was really and wholly a designed piece of swindling"(*p*). To constitute an obtaining within the statute, it is necessary that there should be an intention wholly to deprive the owner of his property in the chattel; obtaining the loan of a chattel, therefore, by false pretences, is not within the statute(*q*).

1231 *Injunction to prevent fraud.*—Whenever a person has been injured in his trade or business, or has sustained some special or peculiar injury from a fraud committed by another, he is entitled to an injunction to prevent the continuance of the injury as well as to compensation in

(*i*) Reg. v. Smith, 26 Law J., M. C. 105.
(*k*) Reg. v. Roebuck, 25 Law J., M. C. 101.
(*l*) Reg. v. Sherwood, 26 Law J., M. C. 81. Reg. v. Ragg, Bell, Cr. C. 214. Reg. v. Eagleton, Dears. & P., Cr. C. 515. Reg v. Lee, 33 Law J., M. C. 129.
(*m*) Reg. v. Bryan, Dears. & B., C. C. 265.
(*n*) Reg. v. Ardley, L. R., 1 C. C. R. 301.
(*o*) 24 & 25 Vict. c. 96, s. 88.
(*p*) Reg. v. Evans, 32 Law J., M. C. 38.
(*q*) Reg. v. Kilham, L. R., 1 C. C. R. 261.

damages. But the court will not lend its assistance for the purpose of preventing mere falsehood, not interfering with the rights of another. It will not, therefore, restrain a tradesman from putting a false statement upon the goods he sells, such as a representation that they had obtained a prize-medal, when no such medal had ever been obtained(*r*).

Fraud on the public affords no ground for a plaintiff coming into a court of equity for an injunction where he has himself no interest in the subject-matter by which the fraud is committed. In these cases, the suit must be at the instance of the Attorney-General(*s*).

1232 *Injunction to prevent the fraudulent use of trade-marks, names, etc.*— The assumption of a name by a stranger who has never before been called by that name is not the subject of a civil action, for by the English law there is no right of property in a person to the use of a particular name, except in connection with a trade or business, which right is recognized, and a person assuming it, colorably or otherwise, in invasion of another's rights, is guilty of a fraud for which a remedy lies either at law or equity(*t*). Thus, it is a fraud on the part of a defendant to set up a business under such a designation as is calcu-

(*r*) Batty *v.* Hill, 1 H. & M. 264.

(*s*) Hall *v.* Barrows, 32 Law J., Ch. 551.

(*t*) Du Boulay *v.* Du Boulay, L. R., 2 P. C. Ca. 430. The name of an inventor, discoverer or manufacturer may be employed as part of a trade-mark. Fulton *v.* Sellers, 4 Brews. (Pa.) 42.

The name of a place may be adopted and used as a trade-mark. Newman *v.* Alvord, 51 N. Y. 189.

The name of a particular spring from which mineral water flows may be used and protected as a trade-mark. Congress & Empire Springs Co. *v.* High Rock Congress Spring Co., 45 N. Y. 291.

But to entitle a name to equitable protection as a trade-mark, the right to its use must be exclusive, and not one which others may employ with as much truth as those who use it. Delaware & Hudson Canal Co. *v.* Clark, 13 Wall. 311. Ellis *v.* Zeilin, 42 Ga. 91. See Wotherspoon *v.* Currie, L. R., 5 Eng. & Ir. App. 508.

The right to the use of the name need not be exclusive as against all the world; but it must be exclusive as against the defendant in the action for the infringment of the right. Newman *v.* Alvord, 51 N. Y. 189.

And in general, any name or device which has been adopted to point out the true source and origin of a manufactured article possesses the requisite characteristics of a trade-mark, and property therein may be acquired by adoption and use. Filley *v.* Fassett, 44 Mo. 168. Gillott *v.* Esterbrook, 48 N. Y. 374. Burnett *v.* Phalon, 3 Keyes, 594.

No property can be acquired in words, marks or devices which do not denote ownership or place of business of a party, but only the kind or quality of the article in which he deals. Ferguson *v.* Davol Mills, 2 Brews. (Pa.) 314; 7 Phil. (Pa.) 253. Amoskeag Manufacturing Co. *v.* Spear, 2 Sandf. (N. Y.) 599. Candee, Swan & Co. v. Deere & Co., 54 Ill. 439.

No property can be acquired in an ordinary term or expression, the use of which as an entirety is essential to the correct designation of the particular article or compound, as for example, "Desicated codfish." Town *v.* Stetson, 3 Daly (N. Y.), 53. See Choynski *v.* Cohen, 39 Cal. 501; Amoskeag Manufacturing Co. *v.* Spear, 2 Sandf. (N. Y.) 599.

A manufacturer has the right to stamp his own name on the goods manufactured by him, and on the bands, wrappers and covers in which they are put up, even though another manufacturer of the same kind of goods having the same surname may thereby suffer injury Faber *v.* Faber, 49 Barb 357.

lated to lead, and does lead, other people to suppose that his business is the business of another person(*u*). Where, therefore, the plaintiffs, trading under the name of "Guinea Coal Company," had obtained a considerable reputation, the defendants, who started in the same street a business under the name of "The Pall Mall Guinea Coal Company," were restrained from using such name in the same street(*u*).

There is no property, strictly speaking, in a trade-mark, but a person may acquire a right of using a particular mark for articles which he manufactures, so that he may be able to prevent any other person from using it(*uu*). Where the mark denotes that articles so marked are manufactured by a particular person, or at a particular place(*v*), and another person puts the same mark on his own goods, this is a fraud upon the original manufacturer who first used the mark, and on purchasers who buy the goods under the impression that they are manufactured by the person whose mark they bear; and this fraud may be redressed by injunction in this country, if it is committed here(*x*), whatever may be the country of the manufacturer who has been defrauded(*y*), and although the marks have been used in ignorance, and under the belief that they were merely fancy decorations(*z*). Where the trade-mark has been used with the knowledge of its being the distinctive device of another manufacturer, the court will, in addition to an injunction against the future use of it, decree an account of profits, and compensation in respect of the past use after knowledge of the prior right(*a*).

A trade-mark may be of the greatest possible value, even though in reality it may not affect the quality of the articles on which it is impressed. It may either indicate that the article was made by a particular person or firm, and so serve as a guarantee for its excellence; or it may have a merely capricious value, as where the article is intended to be sold at a place where the brand is known, and from mere

(*u*) Lee *v.* Haley, L. R., 5 Ch. App. 155. See Delaware & Hudson Canal Co. *v.* Clark, 13 Wall. 311; Newman *v.* Alvord, 51 N. Y. 189, 195.

(*uu*) Ford *v.* Foster, L. R., 7 Ch. App. 611.

(*v*) Radde *v.* Norman, L. R., 14 Eq. Ca. 348.

(*x*) Holloway *v.* Holloway, 13 Beav. 213. Franks *v.* Weaver, 10 Ib. 303.

(*y*) Collins' Co. *v.* Brown, 3 Kay & J. 423. Leather Cloth Co. *v.* American Leather Cloth Co., 1 H. & M. 271. Hostetter *v.* Vanwinkle, 1 Dill. 329. See Graham *v.* Plate, 40 Cal. 593. And even where no fraudulent intent is shown in the unauthorized use of a trade-mark, the persons guilty of the infringement may be required to account for the profits derived from such use. Stonebraker *v.* Stonebraker, 33 Md. 252.

(*z*) Millington *v.* Fox, 3 Myl. & Cr. 338. Cartier *v.* Carlisle, 31 Beav. 292.

(*a*) Edelsten *v.* Edelsten, 1 De G. J. & S. 185. Leather Cloth Co. *v.* American Leather Cloth Co. *supra*. See *ante*, p. 10. A trade-mark may exist in the title of a periodical publication. See Maxwell *v.* Hogg, L. R., 2 Ch. App. 307.

inveteracy of habit people choose to go on purchasing those articles only of the kind which are marked in that particular way, and to which they have always been accustomed(*b*).

The principle upon which courts of law and equity proceed in granting relief and protection in cases of this sort is, that a man ought not to sell his own goods under the pretence that they are the goods of another man, and ought not to be permitted to practice such a deception, nor to use the means which contribute to that end. He is not, therefore, allowed to use names, marks, letters, or other indicia, by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person(*c*), even although he may have some right to the name(*d*). However, where the article sold bears upon its face evidence that it has passed through the hands of a manufacturer other than the original one, and therefore may not be genuine, a mere representation by the seller that he knows it to be manufactured by the original maker, is not such a degree of wilful misrepresentation as to justify the grant of an injunction(*e*).

Where goods marked with a fraudulent trade-mark were deposited in the hands of a bailee, the court granted an injunction against the bailee to prevent him from parting with the goods, and another injunction against the owner to prevent him from proceeding with an action against the bailee for refusing to deliver them up to him(*f*). And where goods bearing a forged trade-mark were in the hands of a firm of forwarding agents, who were ignorant of the forgery, it was held that the persons whose right was infringed were entitled to have the spurious imitation of their mark removed from the goods, and to a lien on the goods for their costs(*g*).

Two things are requisite to be proved to establish a fraud of this description. First, there must be such a general resemblance by one man of the trade-mark of another as to mislead the public, and this is sufficient although the marks are so far different that any one seeing them side by side would not be misled(*h*). And, secondly, a sufficient

(*b*) Hopkins *v.* Hitchcock, 33 Law J., C. P. 154.

(*c*) Perry *v.* Truefitt, 6 Beav. 73. Dixon *v.* Fawcus, 30 Law J., Q. B. 137. Dent *v.* Turpin, Tucker *v.* Turpin, 2 Johns. & Hem. 139; 30 Law J., Ch. 495.

(*d*) Seixo *v.* Provezende, L. R., 1 Ch. App. 192.

(*e*) Ainsworth *v.* Walmsley, L. R., 1 Eq. Ca. 518.

(*f*) Hunt *v.* Maniere, 34 Law J., Ch. 142.

(*g*) Upmann *v.* Elkan, L. R., 12 Eq. Ca. 140; 7 Ch. App. 130.

(*h*) Seixo *v.* Provezende, *supra*. Wotherspoon *v.* Currie, L. R., 5 Engl. & Ir. App. 508. McCartney *v.* Garnhart, 45 Mo. 593. Filley *v.* Fassett, 44 Mo. 168. Boardman *v.* Meriden Brittania Co., 35 Conn. 402. Rowley *v.* Houghton, 2 Brews. (Pa.) 303. Hostetter *v.* Vowinkle, 1 Dill. 329. Popham *v.* Wilcox, 14 Abb. (N. Y.) Pr. N. S. 266. Bradley *v.* Norton, 33 Conn. 157.

distinctive individuality must be preserved, so as to procure for the wrong-doer himself the benefit of the deception which the general resemblance is calculated to produce(*i*).

The original inventor of a new manufacture, and persons claiming through him, is alone entitled to designate such manufacture as "the original," and after the manufacture has obtained a reputation, an injunction will be granted to restrain another manufacturer from applying the designation of "original" to his goods(*k*). But there is nothing to prevent a person who has become acquainted with the mode of compounding a particular preparation from preparing and selling it after the death of the original discoverer, as the preparation of such discoverer, provided he does not assert or suggest that his preparation is the manufacture of the successors in business of the original discoverer, or that his preparation only is genuine, etc.(*l*).

If it is found that the defendant is manufacturing printed labels which the plaintiff alone has a right to use, and the use of which on any goods not manufactured by the plaintiff would be a fraud on the plaintiff, the court will, at the instance of the latter, interfere by injunction to prevent the printing, manufacturing, and selling of such labels, and will not hold back until the whole fraud is brought to a completion by the sale of spurious goods with the spurious trade-marks affixed(*m*). The equitable interference of the court is founded on its jurisdiction to give relief in the shape of preventive justice, in order to protect and make more effectual a legal right, and "protect property from that which, if completed, would give a right of action"(*n*).

Where the plaintiff started omnibuses with particular words and devices marked upon them, an injunction was granted restraining the defendant from starting opposition omnibuses having the same words and devices marked upon them, so as to make it appear that the defendant's omnibuses belonged to, and were under the management of, the plaintiff(*o*).

Where manufacturers have introduced a rare or superior article, and have given it a new name, by which it is known in the market, the court will restrain another manufacturer from bringing out a sim-

(*i*) Croft *v.* Day, 7 Beav. 84.
(*k*) Cocks *v.* Chandler, L. R., 11 Eq. Ca. 446. See Emerson *v.* Badger, 101 Mass. 82.
(*l*) James *v.* James, L. R., 13 Eq. Ca. 421.
(*m*) Farina *v.* Silverlock, 24 Law J., Ch. 634; 26 ib. 11; 6 De G. M. & G. 214.
(*n*) Emperor of Austria *v.* Day, 30 Law J., Ch. 706. Edelsten *v.* Edelsten, *supra*.
(*o*) Knott *v.* Morgan, 2 Keen, 219.

ilar article, and calling it by the same name(*p*). "The court, when it interferes in cases of this sort, is exercising a jurisdiction over legal rights; and although sometimes, in a very strong case, it interferes in the first instance by injunction, yet in a general way it puts the party upon asserting his right by trying it before a jury. If it does not do that, it permits the plaintiff, notwithstanding the suit in equity, to bring an action. In both cases the court is only acting in aid of, and as ancillary to, the legal right, and will not, therefore, at once interfere by injunction, and prevent a defendant from disputing the plaintiff's legal title"(*q*).

Where a trade-mark, the property of a partnership, has been used to denote the place where a particular article is manufactured, or the quality of the goods, it constitutes, as between the surviving partner and the estate of a deceased partner, a portion of the property of the partnership. Where it is used to denote the persons by whom the article is manufactured, the exclusive right of using it would, perhaps, vest in the surviving partners to the exclusion of the deceased(*r*).

Where any particular article derives its celebrity from the place where it is grown or manufactured, such as wine made from a particular vineyard, a sale of the property would carry with it a right to the use of a trade-mark known in the market as denoting the growth of that particular property(*s*).

The person entitled to a trade-mark may, unless it is a purely personal one and imports that the goods sold are the manufacture of a particular individual, assign to another the right to use the mark in common with himself, or he may assign the exclusive use of it, covenanting that he will not use it himself(*t*). If the trade-mark be local, *i.e.*, if it import that goods be manufactured at a particular place, it is doubtful if it could be assigned to persons carrying on business elsewhere(*u*).

If the trade-mark itself contains a material misrepresentation as to the character of the goods to which it is applied, that will disentitle a

(*p*) Braham *v.* Bustard, 1 H. & M. 447. But the mere assumption of another person's name apart from any connection with trade or business, is not a tort. Du Boulay *v.* Du Boulay, *ante*, p. 1050.

(*q*) Ld. Cottenham, Motley *v.* Downman, 3 Myl. & Cr. 1. Collins' Co. *v.* Reeves, 28 Law J., Ch. 56. Blanchard *v.* Hill, 2 Atk. 484.

(*r*) Hall *v.* Barrows, 32 Law J., Ch. 548; 33 ib. 204. See Rogers *v.* Taintor, 97 Mass 291.

(*s*) Leather Cloth Co. *v.* American Leather Cloth Co., 1 H. & M. 287, 8, Wood, V. C. See Congress & Empire Spring Co. *v.* High Rock Congress Spring Co., 45 N. Y. 291.

(*t*) Bury *v.* Bedford, 33 Law J., Ch. 465; *ante*, p. 101. Dixon Crucible Co. *v.* Guggenheim, 2 Brews. (Pa.) 321.

(*u*) Lord Westbury, C., in Leather Cloth Co. *v.* American Leather Cloth Co., *supra*. See Kerr on Injunctions, p. 476.

complainant to an injunction, although the misrepresentation is so obvious that no purchaser would be deceived(*x*). But the mere statement on the trade-mark that the article is "patent" is not such a misrepresentation, although no patent for it has been taken out, if the goods have, from many years' usage, acquired the designation, in the trade generally, of patent(*y*).

(*x*) Leather Cloth Co. *v.* American Leather Cloth Co., 33 Law J., Ch. 199. See Ellis *v.* Zeilin, 43 Ga. 91; Palmer *v.* Harris, 60 Pa. St. 156. *Semble*, also, that it would be a good defence to an action for the imitation of the mark. Ford *v.* Foster, L. R., 7 Ch. App. 611.

(*y*) Marshall *v.* Ross, L. R., 8 Eq. Ca. 651. See Ford *v.* Foster, L. R., 7 Ch. App. 611.

CHAPTER XIX.

OF MATRIMONIAL AND PARENTAL INJURIES, ADULTERY, AND SEDUCTION.

SECTION I.—*Of infringements of matrimonial and parental rights.*—Rights of wives deserted by their husbands—Restitution of conjugal rights—Judicial separation—Cruelty and desertion—Revival of condoned cruelty—What amounts to desertion without cause—Rights of married women after a decree for a judicial separation—Alimony—Adultery and dissolution of the marriage contract—Adultery and desertion on the part of the husband—Wilful neglect or misconduct conducing to adultery—Connivance—Condonation of adultery—Alimony on dissolution of marriage—Orders for settlement of property for the benefit of the innocent party and children—Power of the Divorce Court over marriage settlements—Orders respecting the custody of children—Right of fathers and guardians to the custody of infant children—Control over this right exercised by the courts—Custody of children of British subjects born abroad—Custody of children of foreigners—Right of mothers to the custody of children under seven years of age—Obligation of parents to provide for children—Evidence on the hearing of petitions—Competency of the husband and wife to give evidence—Trial of questions of fact before a jury—Petitions for damages from adulterers—Evidence thereon—Proof of marriage—Damages recoverable—Application thereof.

SECTION II.—*Of seduction.*—Harboring of married women—Seduction and loss of servants, daughters, and wards—Pretended hiring of girls for purposes of seduction—Seduction of married daughters—Proof that defendant, though he seduced the girl, was not the father of her child—Proof of the seduction having been occasioned by the plaintiff's neglect of his parental duties—Parties to actions for seduction—Pleadings, defences, and evidence—Damages recoverable—Indictments for the abduction of unmarried girls under age.

SECTION I.

OF THE INFRINGEMENT OF MATRIMONIAL AND PARENTAL RIGHTS.

1233 *Rights of wives deserted by their husbands.*—A wife deserted by her husband may at any time after such desertion, if resident within the metropolitan district, apply to a police magistrate, or if resident in

the country, to justices in petty sessions, or in either case to the Divorce Court, or the judge ordinary thereof, for an order to protect any money or property she may acquire by her own lawful industry(*a*), and property which she may become possessed of, after such desertion, against her husband, or his creditors, or any person claiming under him; and such magistrate, or justices, or court, if satisfied of the fact of the desertion, and that the same was without reasonable cause, and that the wife is maintaining herself by her own industry or property, may make and give to the wife an order protecting her earnings and property, acquired since the commencement of the desertion(*b*), from her husband and all creditors and persons claiming under him; and such earnings and property will belong to the wife as if she were a *feme sole*(*c*): but every such order, if made by a police-magistrate or justices at petty sessions, must, within ten days after the making thereof, be entered with the registrar of the county court within the jurisdiction of which the wife is resident; and the husband, and any creditor or other person claiming under him, may apply to the court, or to the magistrate, or justices by whom such order was made(*d*), for the discharge thereof. If the husband or any creditor of, or person claiming under, the husband, shall seize, or continue to hold, any property of the wife after notice of any such order, he may be compelled, at the suit of the wife, to restore the specific property, and also a sum equal to double the value of the property so seized or held after such notice as aforesaid: 20 & 21 Vict. c. 85, s. 21; 21 & 22 Vict. c. 108, s. 6.

1234 *Right of action of married women after they have obtained an order for protection*—When an order of protection has been made, the wife, during the continuance thereof, is in the like position in all respects with regard to property and contracts, and suing and being sued, as if she had obtained a decree of judicial separation (s. 21). These provisions extend to property to which the wife becomes entitled as executrix, administratrix, or trustee(*e*). It has been held that a retrospective effect cannot be given to this order—so far as it affects the rights and liabilities of third parties—and, therefore, if a married

(*a*) As to the meaning of term "lawful," see Mason *v.* Mitchell, 34 Law J., Exch. 68.

(*b*) See, In the goods of Ann Elliott, L. R., 2 Prob. & Div. 274.

(*c*) See The Married Women's Property Act, 1870 (33 & 34 Vict. c. 93).

(*d*) It was held, in *Ex parte* Sharp, 33 Law J., M. C. 152, that where the magistrate who had made the order died, his successor had no jurisdiction to discharge it, but the 27 & 28 Vict. c. 44, now provides that his successor, or the justices at subsequent sessions, or the court may discharge the order.

(*e*) 21 & 22 Vict. c. 108, s. 7.

woman commences an action after the desertion of her husband, but before she has obtained an order, the subsequent procurement of the order cannot make valid the invalid proceeding, for it would lead to incalculable mischief if the words of the statute were construed to have that effect as regards third parties(*f*).

The affidavit in support of an application to the Divorce Court for an order under this section of the statute should state circumstances sufficient to satisfy the court of the fact of the desertion. It should set out the time of the husband's going away, and state whether the wife has had any subsequent communication with him, and if so, the nature of that communication, whether she knows where he is or what he is doing, and whether she has received any money from him, or any promise to contribute to her support, or to return to her(*g*).

1235 *What amounts to desertion.*—Desertion, under s. 21 of the Divorce Act, 20 & 21 Vict. c. 85, means not only that the husband has absented himself from his wife, but has left her unprovided for; and such desertion must continue at the time of making the order, so that a *bonâ fide* offer on the part of the husband to return and provide for his wife would take away her right to have the order made(*h*).

A married woman, whose earnings and property have been protected against her husband and his creditors by an order made under s. 21 on account of his desertion of her, may obtain an order from the Court of Chancery for the payment of a legacy given to her in general terms(*i*). In case of her death, also, her personal property will descend to her next of kin, to the exclusion of her husband(*j*).

1236 *Of the restitution of conjugal rights.*—Applications for the restitution of conjugal rights must be made to the Court for Divorce and Matrimonial Causes(*k*). The court may compel the man and wife to live under the same roof, but it cannot constrain them to have intercourse with each other, nor to live together on terms of conjugal affection(*l*). A husband who has been served with a decree in a suit for restitution of conjugal rights, ordering him to take his wife home, is bound to take the first step by inviting her to return to him. If he does not, an

(*f*) Mid. Rail. Co. *v.* Pye, 30 Law J., C. P. 315; 10 C. B., N. S. 179.
(*g*) Sewell, *Ex parte*, 28 Law J., Prob. & Matr. 8.
(*h*) Cargill *v.* Cargill, 27 ib. 70. See *post*, p. 1059.
(*i*) *Re* Kingsley, 28 Law J., Ch. 80.
(*j*) *Re* Stephenson, L. R., 1 Prob. & Div. 287.
(*k*) 20 & 21 Vict. c. 85, s. 17; 21 & 22 Vict. c. 108, s. 19.
(*l*) Shelford on Marriage and Divorce. Rogers on Ecclesiastical Law.

attachment will be issued(*m*). A deed of separation is no bar to a suit for the restitution of conjugal rights(*n*).

The doctrine of the canon law, that, where husband and wife have both been guilty of adultery, there is *compenzatio criminum*, and both are restored to the position of innocent parties, forms no part of the law of England. A suit, therefore, for the restitution of conjugal rights cannot be maintained by a wife who has committed adultery, although the husband has committed adultery(*o*). A suspension of the cohabitation must be clearly proved, in order to warrant the interference of the court(*p*).

1237 *Of judicial separation on the ground of adultery, cruelty, or desertion.* —By the 20 & 21 Vict. c. 85, s. 7, divorce *a mensâ et thoro* is abolished, and in lieu thereof the Court for Divorce and Matrimonial Causes is authorized to pronounce a sentence of judicial separation between husband and wife, which may be obtained (s. 16) either by the husband or the wife on the ground of adultery, or cruelty, or desertion without cause for two years and upwards(*q*). A decree for a judicial separation, if made in the absence of the respondent, may be reversed(*r*). A deed of separation is no bar to a suit for a judicial separation, although it may form a material element for the court to consider in investigating such a suit(*s*), and although if it contained a covenant by the wife not to sue for a judicial separation, such a covenant might perhaps be enforced in equity(*t*). If, after a decree for judicial separation on the ground of cruelty, and while they are living apart, the husband commits adultery, the wife will be entitled to a dissolution of the marriage(*u*).

The wife is entitled, in the discretion of the court, to alimony *pendente lite*(*v*), and an order for such is good, although she is subsequently proved to have been guilty of adultery, and her petition is dismissed(*w*). Such alimony is by the practice of the court payable

(*m*) Alexander *v.* Alexander, 30 Law J., Prob. & Matr. 173.

(*n*) Spering *v.* Spering, 3 Sw. & Tr. 211; 32 Law J., Prob. & Matr. 116. See Anques *v.* Anquez, L. R., 1 Prob. & Div. 177.

(*o*) Hope *v.* Hope, 27 Law J., Prob. & Matr. 43.

(*p*) Orme *v.* Orme, 2 Add. 384.

(*q*) Brookes *v.* Brookes, 28 Law J., Prob. & Matr. 38.

(*r*) 20 & 21 Vict. c. 85, s. 28. Phillips *v.* Phillips, L. R., 1 Prob. & Div. 169.

(*s*) Williams *v.* Williams, L. R., 1 Prob. & Div. 178. See Williams *v.* Baily, *infra*.

(*t*) Williams *v.* Baily, *infra*. See Brown *v.* Brown, L. R., 7 Eq. Ca. 185.

(*u*) Bland *v.* Bland, L. R., 1 Prob. & Div. 237.

(*v*) Thompson *v.* Thompson, L. R., 1 Prob. & Div. 553. Jones *v.* Jones, L. R., 2 Prob. & Div. 333. Hill *v.* Hill, 47 Ga. 332.

But not until the fact of marriage is proved to the satisfaction of the court, or is admitted, if marriage is denied in the answer. Brinkley *v.* Brinkley, 50 N. Y. 184.

(*w*) Whitemore *v.* Whitemore, L. R., 1 Prob. & Div. 96. See Coombs *v.* Combs, ib. 218. As

to her personally, but if she chooses to pay it into her attorney's hands, his lien upon it for her costs will attach(*x*).

1238 *What amounts to cruelty.*—If a husband refuses his wife the common necessaries of life, or treats her with gross insult and indignity; if he spits in her face, attempts to debauch her maid-servants(*y*), or puts her unnecessarily into confinement, or under personal restraint; or strikes her, or threatens her with personal violence unjustifiably, and without adequate provocation(*z*), and conducts himself so as to give her a reasonable apprehension of bodily harm if she continues to reside with him, he is guilty of cruelty, and entitles her to separation of bed and board(*a*). Everything is, in legal construction, cruelty,

to an injunction against the payment of alimony *pendente lite*, see Williams *v.* Baily, L. R., 2 Eq. Ca. 731.

(*x*) *Ex parte* Bremner, L. R., 1 Prob. & Div. 254.

(*y*) Saunders *v.* Saunders, 1 Rob. Eccl. 549. Divorces are not granted where the complainant wilfully provoked the violence or misconduct complained of, unless such violence was entirely out of proportion to the provocation. Reed *v.* Reed, 4 Nev. 395. Knight *v.* Knight, 31 Iowa, 451. Richards *v.* Richards, 37 Penn. St. 225. Johnson *v.* Johnson, 14 Cal. 459. Trowbridge *v.* Carlin, 12 La. An. 882. Skinner *v.* Skinner, 5 Wis. 449. David *v.* David, 27 Ala. 223. Poor *v.* Poor, 8 N. H. 307.

(*z*) Waring *v.* Waring, 2 Phill. 132.

(*a*) Gregory's case, 4 Burr. 1991. Leete *v.* Leete, 31 Law J., Prob. & Matr. 121. Waddell *v.* Waddell, ib. 123. Legal cruelty, authorizing divorce from a husband, consists either in acts of personal violence or such conduct on his part as creates reasonable apprehension of danger to the life, limb or health of the wife. Odour *v.* Odour, 30 Ga. 286. Cole *v.* Cole, 23 Iowa, 433. Ford *v.* Ford, 104 Mass. 198. Hughes *v.* Hughes, 44 Ala. 606. Caruthers *v.* Caruthers, 13 Iowa, 266. Morris *v.* Morris, 14 Cal. 76. Johnson *v.* Johnson, 4 Wis. 135. Bowie *v.* Bowie, 3 Md. Ch. Decis. 51. Nogees *v.* Nogees, 7 Texas, 538. See Shaw *v.* Shaw, 17 Conn. 189.

In Alabama a divorce *a mensa et thoro* was decreed where the acts of cruelty consisted in pulling the wife's hair, choking her, and striking her in the face. Turner *v.* Turner, 44 Ala. 437.

In Illinois it was held that the repeated use of harsh and profane language by the husband to the wife, and choking her in one instance with the threat to do so again, did not constitute that extreme and repeated cruelty which is necessary to authorize a divorce under the statutes of that State. Embree *v.* Embree, 53 Ill. 394.

In Wisconsin it was held that the repeated application of coarse epithets to a wife, when accompanied in one instance by personal violence, and in another by threats to take her life, was sufficient cruelty to furnish ground for divorce. Freeman *v.* Freeman, 31 Wis. 235.

Under the Pennsylvania statute it is a good ground for divorce, 1, that the husband has by cruel and barbarous treatment endangered his wife's life, and 2, has offered such indignities to her person as to render her condition intolerable and life burdensome. But it is not necessary to bring a case within the statute, that the indignities to the wife should be of such a character as to endanger her life. May *v.* May, 62 Penn. St. 206. The habitual use of profane, threatening and abusive language towards the wife, neglect to provide the necessaries of life, and a single assault and battery without provocation, together with frequent intoxication are such indignities to her person as to entitle a wife to a divorce *a vinculo* Doan *v.* Doan, 3 Pa. Law Jour. R. 7. But see Cutler *v.* Cutler, 2 Brews. (Pa.) 511. On the other hand such treatment of a husband by his wife as renders his "condition intolerable and his life burdensome, is a ground for a divorce *a vinculo*. Jones *v.* Jones, 66 Penn. St. 494.

The statutes of New York authorize a divorce *a mensa et thoro* in favor of the wife for cruel and inhuman treatment by the husband, or for such conduct on his part as renders it unsafe for the wife to cohabit with him. As to what circumstances will warrant a decree for a divorce under this statute, see Davies *v.* Davies, 55 Barb. 130.

"Extreme cruelty, whether practiced by personal violence or by any other means," is

which tends to bodily harm, and in that manner renders cohabitation unsafe. Whenever there is a tendency to bodily mischief, it is a peril from which the wife is to be protected. It is not necessary to inquire from what motive the treatment proceeds. Nor is it necessary that the conduct of the wife should be entirely without blame, for the imputation of blame to the wife will not justify the ferocity of the husband. Constant insult, constant vituperation, and charges of gross offences, made in the presence of the wife and before her friends, servants, or strangers, and such injurious treatment as renders life unbearable, constitute good grounds for a separation, but mere turbulence of temper and petulance of manners are not sufficient. The assistance of the court, moreover, will not be afforded to a wife who has taken upon herself to avenge her own wrongs, and to maintain a contest of retaliation(*b*). In order to establish the charge of cruelty, it is necessary to prove actual violence of such a character as to endanger personal health or safety, or the reasonable apprehension of such violence. And the ground of the court's interference in the wife's (or husband's) safety, and the impossibility of her (or him) performing the duties of matrimony in a state of dread(*c*). However, moral force only, if sytematically exerted to compel the submission of a wife in such a manner, and to such a degree, as to injure her health and render a serious illness imminent, amounts to legal cruelty(*d*).

Where it appeared that a married couple had for thirty years been

made a ground of divorce by the statutes of Michigan. The constant and heartless persistence in words or deeds which intrinsically and separately would not amount to such a degree of cruelty as to justify a divorce under this statute, may become so intolerable an outrage upon the sense of decency of a woman not bred to brutality as to render the marriage relation unendurable and justify a divorce. Briggs *v.* Briggs, 20 Mich. 34. But the habitual indulgence of profane and insulting language on the part of the wife towards the husband is not such an extreme degree of cruelty as to justify a divorce. Bennett *v.* Bennett, 24 Mich. 482.

Acts of positive violence which standing alone would not justify a divorce *a mensa et thoro* may, when taken as a whole, show such a series of acts of inhuman, coarse and brutal treatment as will justify the decree. See Thomas *v.* Thomas, 20 N. J. Eq. 97.

Under the laws of Maryland, violent and outrageous conduct on the part of the wife towards the husband, rendering the proper discharge of the duties of married life impossible, is sufficient ground for a divorce *a mensa et thoro*. Lynch *v.* Lynch, 33 Md. 328.

Under the laws of Texas, such excesses, cruel treatment or outrages as render living together as husband and wife insupportable are grounds for divorce. Shearman *v.* Shearman, 18 Texas, 521. Thus a series of studied vexations and deliberate insults and provocations, is under this statute a sufficient cause for divorce without apprehension of personal violence or bodily hurt. Sheffield *v.* Sheffield, 3 Texas, 79.

In Delaware a divorce *a vinculo* will be granted for extreme cruelty. Kingsberry *v.* Kingsberry, 3 Harring. 8.

(*b*) Holden *v.* Holden, 1 Hagg. Cons. 458. Evans *v.* Evans, ib. 119. Oliver *v.* Oliver, ib. 361 Paterson *v.* Paterson, 3 H. L. C. 328. Curtis *v.* Curtis, 27 Law J., Prob. & Matr. 75.

(*c*) Milford *v.* Milford, L. R., 1 Prob. and Div. 295.

(*d*) Kelly *v.* Kelly, L. R., 2 Prob. & Matr. 31; ib. 59.

continually quarelling, and the wife petitioned for a judicial separation, the judge held that he had no power to separate them on that account; for married persons cannot be legally separated upon the disinclination of one or both of them to cohabit together leading to perpetual quarrels(*e*). "If a woman gets drunk, and loses her self-possession and uses violence, or attempts to destroy the property or stock in trade of her husband, he may employ as much violence as is necessary to protect his property or himself; but he goes too far if he follows her away, and strikes her after she has ceased her violence. The law gives a man no authority to beat a drunken wife"(*f*). Where a husband sought to get rid of a drunken and passionate wife, who destroyed his furniture, the judge said, "I must be cautious about opening the court to cases of this description. The wife may have an unruly propensity in her drunken fits to destroy property, but there is no evidence of such *sævitia* as would justify me in decreeing a judicial separation"(*g*). And conversely, it has been held, that habitual drunkenness on the part of the husband, although united with much annoyance and extraordinary conduct, does not amount to legal cruelty(*h*). But the communication to the wife of venereal disease does, if wilful, and the wilfulness is to be presumed in the absence of evidence to the contrary(*i*).

1239 *Revival of condoned cruelty.*—If cruelty has been condoned by the wife on condition that she is received back and restored to her proper position as a wife in her husband's household and the condition is broken by the husband, the cruelty is revived, and the wife entitled to a judicial separation(*j*). Where there have been acts of violence followed by condonation, threats subsequently uttered of such a nature, and so expressed, as to satisfy the court that further cohabitation would be attended with danger to the party threatened, constitute a sufficient ground for a decree for a judicial separation(*k*). The doctrine of revival, however, does not apply to the compromise of a divorce suit, for where a suit is in derogation of the marriage contract, the court

(*e*) Bostock *v.* Bostock, 27 Law J., Prob. & Matr. 87.
(*f*) Pearman *v.* Pearman, 29 Ib. 54.
(*g*) Scott *v.* Scott, 29 Law J., Prob. & Matr. 64.
(*h*) Brown *v.* Brown, L. R., 1 Prob. & Div. 46.
(*i*) *S. C.*, and Boardman *v.* Boardman, L. R., 1 Prob. & Div. 233. See Morphett *v.* Morphett, 38 Law J., Prob. & Matr. 23; L. R., 1 Prob. & Div. 702.
(*j*) Cooke *v.* Cooke, 32 L. J., P. & M. 81, 154. See Robbins *v.* Robbins, 100 Mass. 150; Davies *v.* Davies, 55 Barb. 130; Calkins *v.* Long, 22 Barb. 97; Sullivan *v.* Sullivan, 34 Ind. 368; Phillips *v.* Phillips, 27 Wis. 252; Nogees *v.* Nogees, 7 Texas, 538.
(*k*) Bostock *v.* Bostock, 27 L. J., P. & M. 88.

will favor an arrangement that prevents the scandal of a public investigation(*l*).

1240 *What amounts to desertion without cause.*—Desertion does not necessarily commence when cohabitation ceases(*m*). A husband who absents himself from his wife for the *bonâ fide* purpose of obtaining employment, and continues absent with the concurrence of his wife, or without any communication to him of her disapproval of his absence, or any manifestation of a desire on her part for his return to her, cannot be said to have deserted her within the meaning of s. 16 of the Divorce Act. "I think it clear," observes the Judge Ordinary, "that to constitute desertion without cause by the husband, it must be shown that he has wilfully absented himself without cause from the society of his wife, and in spite of her wish, she not being a consenting party"(*n*).

(*l*) Rowley *v.* Rowley, L. R., 1 Sc. & Div. App. 63.

(*m*) Gatehouse *v.* Gatehouse, L. R., 1 Prob. & Div. 351. See *ante*, p. 1059.

(*n*) Thompson *v.* Thompson, 27 Law J., Prob. & Matr. 63. Haviland *v.* Haviland, 32 Ib. 65. A wife is entitled to a divorce *a mensa et thoro*, when it appears that her husband has abandoned her, with an intent, not founded on good cause, to separate from her and to cease to provide for her support. Orr *v.* Orr, 8 Bush (Ky.), 156.

The reasonable cause which will justify an abandonment must be one which would constitute a good ground for divorce. Butler *v.* Butler, 4 Pa. Law Jour. R. 284. Pierce *v.* Pierce, 33 Iowa, 238. Cutler *v.* Cutler, 2 Brews. (Pa.) 511. Grove's Appeal, 37 Penn. St. 443.

Abandonment, under the Virginia statutes, consists in an actual breaking off of matrimonial cohabitation, with intent to abandon and desert. Bailey *v.* Bailey, 21 Gratt. (Va.) 43.

Under the laws of Maryland, abandonment is a ground for divorce *a vinculo*. But the abandonment must have been the deliberate act of the defendant, with intent to put an end to the marriage relation; and if the abandonment is mutual and equally deliberate and final on both sides, neither party can have a divorce *a vinculo*. Lynch *v.* Lynch, 23 Md. 328.

Under the Massachusetts statutes, desertion consists in wilfully denying a wife the companionship of her husband and the protection of his home, with the intentional and permanent abandonment of all matrimonial intercourse against the consent of the wife. Magrath *v.* Magrath, 103 Mass. 577.

A wilful and malicious refusal by a wife to accompany her husband to a new home, without any just or reasonable cause is a desertion. Cutler *v.* Cutler, 2 Brews. (Pa.) 511. See Hardenbergh *v.* Hardenbergh, 14 Cal. 654; Gleason *v.* Gleason, 4 Wis. 64.

The desertion of one party, caused and justified by the misconduct of the other, is not the desertion of the other. Cornish *v.* Cornish, 23 N. J. Eq. 209. Fera *v.* Fera, 98 Mass. 155.

If the husband actually drives his wife away from his house, or by cruel and abusive treatment compels her to leave it for safety or comfort, it is an abandonment by the husband and not by the wife. Starkey *v.* Starkey, 21 N. J. Eq. 135. See Harding *v.* Harding, 22 Md. 337; Levering *v.* Levering, 16 Md. 213; Wood *v.* Wood, 5 Ired. 674.

The partial or total neglect on the part of the husband to support his wife is not a desertion of the wife, and is no ground of divorce. Palmer *v.* Palmer, 23 N. J. Eq. 88.

Unless it is made so by statute, as in Michigan (Comp. Laws, s. 3228), and other States, where a divorce *a mensa et thoro* may be granted if the husband, having sufficient ability to provide a suitable maintenance for his wife, grossly, wantonly and cruelly refuses and neglects to do so. See Mandigo *v.* Mandigo, 15 Vt. 786; Hurlburt *v.* Hurlburt, 14 Vt. 561; Washburn *v.* Washburn, 9 Cal. 475; Davis *v.* Davis, 37 N. H. 491.

And there may be a legal desertion, where the husband from time to time contributes to the support of the wife. Magrath *v.* Magrath, 103 Mass. 577.

A refusal of marital intercourse, although not justified by considerations of health or physical disability, is not desertion. Southwick *v.* Southwick, 97 Mass. 327.

Nor is it a justification of desertion. Reid *v.* Reid, 21 N. J. Eq. 331. Or a ground for divorce. Magill *v.* Magill, 3 Pittsb. (Pa.) 25. Nor, under such circumstances, is very frequent

A voluntary cesser of cohabitation, therefore, upon the execution of a deed of separation, or the execution of such a deed subsequently to the cesser of cohabitation, is an answer to the charge of desertion, unless it be shown that the husband had fraudulently, by a pretence of an agreement which he never intended to fulfil, induced her to consent to such separation(*o*). The "cause" mentioned, although not necessarily a distinct matrimonial offence on which a decreee of judicial separation or dissolution of marriage could be founded, must be grave and weighty. Mere frailty of temper (unless amounting to cruelty), and habits distasteful to the husband, are not sufficient causes(*p*).

Desertion under this section means that the husband has withdrawn from cohabitation, even although he has not left his wife unprovided for(*q*); and such desertion must have continued for two years at the time of the making of the petition for a judicial separation, so that a *bonâ fide* offer of the husband to return and provide for his wife and take her home, he having a home prepared for her, would take away her right to a judicial separation(*r*). But a mere vague intimation by the husband to the wife that she may rejoin him, not containing any definite offer of a home, will not deprive her of this right when once acquired(*s*). Nor is an offer to return by a man who is then living with another woman a *bonâ fide* one(*t*). Nor will the payment of an allowance by the wife to the husband for a short time, or even the signing of a deed of separation, prevent the desertion from being contrary to her wish, if she ceased payment of the allowance shortly after the execution of the deed, on the ground that it would induce

intercourse a justification for desertion, in the absence of proof of violence or compulsion on the part of the husband. Moores *v.* Moores, 1 Green (N. J.), 275. See Leavitt *v.* Leavitt, Wright, 719. Nor is mere absence for a term of years, in the absence of circumstances showing the intention, a desertion in the legal sense of the term. Rogers *v.* Rogers, 3 Green (N. J.), 445.

Wilful desertion, as used in the California statutes in regard to divorces, means intentional desertion, a cessation of matrimonial cohabitation with intent to desert. It does not imply malice. Benkert *v.* Benkert, 32 Cal. 467. Morrison *v.* Morrison, 20 Cal. 431.

In Tennessee, the desertion must be wilful and malicious, and without reasonable cause. The malice must be malice in fact, and not malice in law. Stewart *v.* Stewart, 2 Swan (Tenn.), 591.

Where a woman leaves her husband with his consent and remains absent a term of years, this is not such a desertion as will entitle him to a divorce. Lea *v.* Lea, 8 Allen (Mass.), 418. See Jennings *v.* Jennings, 2 Beasley (N. J.), 38; Simpson *v.* Simpson, 31 Mo. 24; Fulton *v.* Fulton, 36 Mo. 517; Rutledge *v.* Rutledge, 5 Sneed (Tenn.), 554.

(*o*) Crabb *v.* Crabb, L. R., 1 Prob. & Div. 601. Parkinson *v.* Parkinson, L. R., 2 Prob. & Matr. 25.

(*p*) Yeatman *v.* Yeatman, *infra*.

(*q*) Yeatman *v.* Yeatman, L. R., 1 Prob. & Div. 489. See Magrath *v.* Magrath, 108 Mass. 577.

(*r*) Cargill *v.* Cargill, 27 Law J., Prob. & Matr. 69.

(*s*) Cudlipp *v.* Cudlipp, ib. 64.

(*t*) Mallinson *v.* Mallinson, L. R., 1 Prob. & Div. 93.

him to keep away(*u*). When once cohabitation has ceased to exist, whether by the adverse act of the husband or wife, or even by the mutual consent of both, desertion becomes from that moment impossible to either, till their common life and home have been resumed(*v*).

1241 *Rights of married women after a decree for a judicial separation.*—After a decree for a judicial separation, the wife has the legal status of a *feme sole* in respect of wrongs and injuries, and suing and being sued in any civil proceeding, and her husband is not liable in respect of any wrongful act or omission by her, or for any costs she may incur as plaintiff or defendant (s. 26)(*w*).

1242 *Alimony in cases of judicial separation.*—The Divorce Court, after making a decree for a judicial separation, may also make a decree or order for alimony, for her comfortable subsistence in accordance with her husband's income(*x*), and her own earnings, where she is supporting herself(*y*), and may (s. 24) direct the same to be paid either to the wife herself, or to any trustee on her behalf, to be approved by the court, and may impose any terms or restrictions which to the court may seem expedient(*z*); and if alimony decreed, or ordered to be paid, is not duly paid, the husband will (s. 26) be liable for necessaries supplied to the wife. The payment of alimony will be enforced by writ of sequestration if necessary(*a*), and the alimony may be increased by the court, if the husband's income increases(*b*).

1243 *Of adultery and the dissolution of the marriage contract.*—Adultery was formerly an indictable, and for about ten years was *de facto* a capital offence, being made so by a statute passed A.D. 1650(*c*). This statute became a nullity at the Restoration, and adultery has since been held to be a mere civil injury and ground for divorce. The Divorce Act, 20 and 21 Vict. c. 85, s. 27, enacts, that a husband(*d*) may

(*u*) Nott *v.* Nott, L. R., 1 Prob. & Div. 251. And see Keech *v.* Keech, 38 Law J., Prob. & Matr. 7; Parkinson *v.* Parkinson, L. R., 2 Prob. & Matr. 27.

(*v*) Fitzgerald *v.* Fitzgerald, 38 Law J., Prob. & Matr. 14; L. R., 1 Prob. & Matr. 694. See Buckmaster *v.* Buckmaster, L. R., 1 Prob. & Matr. 713; 38 L. J., Prob. & Matr. 73; Cooper *v.* Cooper, 17 Mich. 205.

(*w*) See *Re* Insole, L. R., 1 Eq. Ca. 471.

(*x*) Hooper *v.* Hooper, 30 Law J., Prob. & Matr. 49. See Haigh *v.* Haigh, 38 Law J., Prob. & Matr. 37; L. R., 1 Prob. & Div. 694. See Turner *v.* Turner, 44 Ala. 437.

(*y*) Goodheim *v.* Goodheim, 30 Law J., Prob. & Matr. 162. See Brown *v.* Brown, 22 Mich. 242.

(*z*) Franks *v.* Franks, 31 Law J., Prob. & Matr. 23. Avila *v.* Avila, ib. 176. Fletcher *v.* Fletcher, ib. 83.

(*a*) Clinton *v.* Clinton, L. R., 1 Prob. & Div. 215.

(*b*) Louis *v.* Louis, L. R., 1 Prob. & Div. 230. See Williams *v.* Williams, ib. 370.

(*c*) 2 Scobell's Acts, part 2, p. 121.

(*d*) These words have no application to the case of a union between two persons in any country where polygamy is lawful, and the court here has no jurisdiction over such marriages, for the term marriage, as understood in Christendom, is the voluntary union for life of one person with another, to the exclusion of all others. Hyde *v.* Hyde, L. R., 1 Prob. & Div. 130.

petition the court for the dissolution of the marriage on the ground of adultery on the part of his wife(*d*), and the wife(*d*) may petition for the dissolution of the marriage on the ground that her husband(*d*) has been guilty of incestuous adultery, or of bigamy with adultery(*e*), or rape, sodomy, or bestiality, or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce *a mensâ et thoro*(*f*), or of adultery coupled with desertion, without reasonable excuse, for two years or upwards. But if it appears to the court that the petitioner has been in any manner accessory to, or conniving at, the adultery(*g*), or has condoned it (s. 29), or that the petition is presented or prosecuted in collusion with either of the respondents(*h*), the petition will (s. 30) be dismissed. And if in the opinion of the court the petitioner has been guilty of unreasonable delay in presenting or prosecuting the petition, or of cruelty towards the other party to the marriage, or of having deserted or wilfully separated from the other party to the marriage before the adultery complained of, and without reasonable excuse(*i*), or of such wilful neglect or misconduct as has conduced to the adultery(*k*) it is competent to the court (s. 31) to refuse to dissolve the marriage(*l*). The court, however, may, in the exercise of its discretion, dissolve the marriage at the instance of the wife, although she has been guilty of adultery, if such adultery was caused by the coercion of the respondent, and was practised against the will and desire of the petitioner(*m*). Misconduct conducing to adultery is not mere carelessness, but a knowledge by the husband of an intimacy distinctly dangerous, and a purposed or reckless disregard of it(*n*).

A suit for dissolution of marriage cannot be maintained against a lunatic on any ground whatever(*o*); and if, at the time of the service

(*d*) These words have no application to the case of a union between two persons in any country where polygamy is lawful, and the court here has no jurisdiction over such marriages, for the term marriage, as understood in Christendom, is the voluntary union for life of one person with another, to the exclusion of all others. Hyde *v.* Hyde, L. R., 1 Prob. & Div. 130.

(*e*) Horne *v.* Horne, 27 Law J., Prob. & Matr. 50.

(*f*) *Ante*, p. 1060. Ward *v.* Ward, 27 ib. 63. Milner *v.* Milner, 31 ib. 159.

(*g*) Walton *v.* Walton, 28 ib. 97. Studdy *v.* Studdy, ib. 105. Hedden *v.* Hedden, 21 N. J. Eq. 61.

(*h*) See Todd *v.* Todd, L. R., 1 Prob. & Div. 121; Barnes *v.* Barnes, ib. 505.

(*i*) Coulthart *v.* Coulthart, 28 Law J., Prob. & Matr. 21. Yeatman *v.* Yeatman, L. R., 2 Prob. & Div. 187.

(*k*) Du Terraux *v.* Du Terraux, 28 Law J., Prob. & Matr. 95. Cunnington *v.* Cunnington, ib. 101. Groves *v.* Groves, ib. 108. Haswell *v.* Haswell, 29 ib. 21. Hughes *v.* Hughes, L. R., 1 Prob. & Div. 219.

(*l*) Boreham *v.* Boreham, L. R., 1 Prob. & Div. 77. Lempriere *v.* Lempriere, ib. 569.

(*m*) Coleman *v.* Coleman, L. R., 1 Prob. & Div. 81.

(*n*) Dering *v.* Dering, L. R., 1 Prob. & Div. 531.

(*o*) Bawden *v.* Bawden, 31 Law J., Prob. & Matr. 94. See Mordaunt *v.* Mordaunt, L. R., 2 Prob. & Matr. 393; but see Rathbun *v.* Rathbun, 40 How. (N. Y.) Pr. 328.

of the citation, the respondent is so mentally deranged as to be unfit to answer the petition or to instruct her attorney, the suit will be stayed till she recovers her mental capacity(*p*). But the committee of a lunatic may maintain a suit for a judicial separation on the ground of the adultery of the wife of the lunatic(*q*). And a suit for a nullity of marriage may be maintained by a lunatic through a guardian appointed by the court(*r*).

1244 *Adultery and desertion on the part of the husband* giving the wife a right to a dissolution of the marriage must, therefore, continue for two years or upwards without reasonable excuse. Where the husband on being reproached with his adulterous connection, declared he would go away and live with his paramour, and his wife said, "Go, and when you are tired of her, come back to me," and the husband took up his hat, but before he got out of the house his wife made him promise that he would return to her, but he never came back, and, two years and upwards having elapsed, the wife sued for a dissolution of the marriage, it was held that she had given no such assent or sanction to the desertion as disentitled her to a decree(*s*). A wife is not deprived of her right under s. 27 to a divorce on the ground of adultery coupled with desertion, for two years and upwards, by a subsequent offer on the part of the husband to return and cohabit with her(*t*).

1245 *Wilful neglect or misconduct on the part of the husband conducing to adultery on the part of the wife.*—The policy of the legislature seems to have been to deprive the husband of a remedy by divorce if he has misconducted himself as a husband and has contributed to his own dishonor(*u*), not to punish neglect or misconduct unconnected with the relation of husband and wife. The neglect or misconduct of the husband, therefore, which disentitles him to a divorce, must be in his marital capacity, and a breach of some marital duty. If, therefore, the husband is convicted of felony and transported, and the wife, being deprived of the protection of her husband, then lives in adulterous intercourse with another man, the conviction and transportation of the husband do not constitute misconduct in the husband disentitling him to a divorce(*v*). So, where an infant under age, who had contracted a clandestine marriage with a prostitute, was sent out of the

(*p*) Mordaunt *v.* Mordaunt, L. R., 2 Prob. & Div. 199, *diss.* Kelly, C.B.
(*q*) Woodgate *v.* Naylor, 30 Law J., Prob. & Matr. 197.
(*r*) Hancock *v.* Peaty, L. R., 1 Prob. & Div. 335.
(*s*) Haviland *v.* Haviland, 32 Law J., Prob. & Matr. 65.
(*t*) Cargill *v.* Cargill, 27 ib. 69.
(*u*) Jeffreys *v* Jeffreys, 33 Law J., Prob. & Matr. 84.
(*v*) Cunnington *v.* Cunnington, 28 ib. 101.

country by his guardians and prevented from communicating with his wife, and the wife relapsed into her old trade of prostitution, it was held that the involuntary desertion of the wife by the infant husband formed no bar to a suit by him for the dissolution of the marriage(*w*). But where a person, having married a woman of loose character, separated himself from her against her will, and sent her to live at a place where she would be peculiarly subject to temptation, and she committed adultery accordingly, it was held that the husband's conduct had conduced to it(*x*). The neglect, however, intended by the legislature is neglect conducing to the wife's original fall, not neglect conducing to any particular act of adultery committed subsequent to her fall(*y*).

1246 *Connivance or toleration of adultery* on the part of the husband will deprive him of his right to the dissolution of the marriage. If, therefore, a husband, finding that his wife has committed adultery, forgoes his claim to a divorce in consideration of a sum of money, not condoning the offence, but allowing her to remain his wife, and allowing his remedy to be barred by a verdict in favor of the respondent and co-respondent, he will be taken to have given a tacit consent to any future intercourse between her and her paramour. A man so acting withdraws his objection to the intercourse that has taken place, and sells his assent to the prostitution of his wife, and cannot afterwards complain of that which he has himself sanctioned. A man consenting to adultery with A, but not consenting to adultery with B, cannot make the adultery with B a ground for a dissolution of the marriage. He cannot be heard to say *non omnibus dormio*, or *non semper dormio*. Such language and such conduct are not to be endured. Connivance, therefore, by the husband to any one act of criminal intercourse on the part of the wife, may deprive him of redress by a dissolution of the marriage for a subsequent act of adultery not tolerated or connived at by him(*z*). To establish connivance, it is requisite, not that the person conniving should be actually an accessory before the fact by doing anything to bring about the adultery, but that he should be cognizant that it would or must result from certain transactions that he approved of, and consented to(*a*). Mere negligence, mere inattention, mere dullness of apprehension, mere indifference, will not suffice, there must be an

(*w*) Beavan *v.* Beavan, 32 Ib. 36.
(*x*) Baylis *v.* Baylis, L. R., 1 Prob. & Div. 395.
(*y*) St. Paul *v.* St. Paul, L. R., 1 Prob. & Matr. 439; 38 L. J., Prob. & Matr. 57.
(*z*) Gipps *v.* Gipps, 32 Law J., Prob. & Matr. 78. Lovering *v.* Lovering, 3 Hagg. 87. Crewe *v.* Crewe, ib. 126. See Myers *v.* Myers, 41 Barb. 114.
(*a*) Glennie *v.* Glennie, 32 Law J., Prob. & Matr. 17. Phillips *v.* Phillips, 31 ib. 69. Allen *v.* Darcy, 30 ib. 4.

intention, on the husband's part that the wife should commit adultery. If such a state of things existed as would, in the apprehension of reasonable men, result in the wife's adultery, and the husband, intending and desiring such a result, refrains from interfering to prevent it, when he might have done so, he is guilty of connivance(*b*).

1247 *Connivance on the part of the wife.*—An agreement to live separate would amount to connivance if it were made with knowledge of the adultery committed by the husband and the probability of its continuance, even although it might be forced upon the wife by the pressure of circumstances—*e.g.*, to obtain an allowance(*c*).

1248 *Condonation of adultery* is forgiveness of the conjugal offence, with full knowledge of all the circumstances(*d*). "Judges of great eminence have said that there is a great difference between what would constitute condonation of the adultery of the husband and what that of the wife; that conduct which would be considered culpable in a husband would be considered praiseworthy in a wife; that forgiveness on the part of the wife, in the hope of reclaiming her husband, would be meritorious, while a similar forgiveness by the husband would be dishonorable. Passages to this effect abound in the judgments of Lord Stowell and Sir J. Nicholl"(*e*). The forgiveness of a wife, which is to take away the husband's right to a divorce, must not fall short of reconciliation, and this must be shown by the reinstatement of the wife in her former position, so that subsequent conjugal cohabitation must be proved. Mere words of condonation, however strong, can only be regarded as imperfect forgiveness, and unless followed up by reconciliation and the reinstatement of the wife in the position she occupied before she transgressed, are incomplete, and do not amount to legal condonation. There is no legal condonation where the act of forgiveness has not been accompanied or followed by conjugal cohabitation(*f*).

The fact of the adultery of one of the parties having been condoned is no bar to a petition for a divorce on account of adultery afterwards committed by the other(*g*), provided there has been no connivance in,

(*b*) Allen *v.* Allen, 30 lb. 4. Marris *v.* Marris, 31 lb. 69.

(*c*) Ross *v.* Ross, L. R., 1 Prob. & Matr. 734.

(*d*) Dempster *v.* Dempster, 31 L. J., P. & M. 20. See Newsome *v.* Newsome, L. R., 2 Prob. & Div. 306. A cohabitation by the husband with the wife after the commission of adultery by her, with knowledge of the fact, condones the offence, and is an absolute bar to an action for a divorce. 2 N. Y. R. S., 145, s. 42. Pitts *v.* Pitts, 52 N. Y. 593. Bronson *v.* Bronson, 7 Phil. (Pa.) 405. Phillips *v.* Phillips, 4 Blackf. 131. See Marsh *v.* Marsh, 2 Beasley (N. J.), 281.

But eighteen years of cohabitation after the act of adultery complained of, is no defence if the complainant was meanwhile ignorant of the act. Clark *v.* Clark, 97 Mass. 373.

(*e*) Peacock *v.* Peacock, 27 Law J., Prob. & Matr. 71.

(*f*) Keats *v.* Keats, 28 Law J., Prob. & Matr. 78. See Armstrong *v.* Armstrong, 32 Miss. 279.

(*g*) Anichini *v.* Anichini, 2 Curt. 210.

or sanction of, the adulterous intercourse(*h*). The adultery of the wife, therefore, if it has been condoned by the husband, is no bar to a suit by her for a judicial separation on the ground of adultery subsequently committed by him(*i*).

When the issues are to be tried by a jury, the question whether or not there has been condonation is a question of fact to be decided by the jury, and not a question of law. It is for the court to direct the jury what will constitute condonation, and for the jury to determine whether, subject to that direction, the circumstances of the particular case amount to condonation(*j*).

1249 *Alimony in cases of dissolution of marriage.*—On a decree(*k*) for a dissolution of marriage, the court may (s. 32) order the husband to secure such a sum of money for the support of the wife as it may deem reasonable, having regard (s. 32) to the wife's fortune, the ability of the husband, and the conduct of the parties(*l*). And the payment may be ordered to be made weekly or monthly, 29 & 30 Vict. c. 32.

1250 *Orders for the settlement of property for the benefit of the innocent party and children* of the marriage may be made as to the property of the wife, where a sentence of divorce or judicial separation has been founded on adultery committed by her(*m*).

1251 *Power of the Divorce Court over marriage-settlements.*—By 22 & 23 Vict. c. 61, s. 5, it is enacted, that the Court of Divorce, etc., after a final decree of nullity of marriage, or dissolution of marriage, may inquire into the existence of ante-nuptial or post-nuptial(*n*) settlements, made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole, or a portion of the property settled, either for the benefit of the children of the marriage(*o*), or of their respective parents, or both(*p*), as to the court shall seem fit(*q*). Where there is no issue of the marriage, or if there has been and the children are dead, the court cannot vary

(*h*) Gipps *v.* Gipps, *ante*, p. 1069.
(*i*) Seller *v.* Seller, 28 Law J., Prob. & Matr. 99.
(*j*) Peacock *v.* Peacock, 27 Law J., Prob. & Matr. 71.
(*k*) *i.e.*, on the final decree, Charles *v.* Charles, L. R., 1 Prob. & Div. 200.
(*l*) Fisher *v.* Fisher, 31 Law J., Prob. & Matr. 1. Morris *v.* Morris, ib. 33. Robotham *v.* Robotham, 27 ib. 61.
(*m*) 20 & 21 Vict. c. 85, s. 45; 23 & 24 Vict. c. 144, s. 6. Milne *v.* Milne, L. R., 2 Prob. & Div. 295.
(*n*) Bullock *v.* Bullock, L. R., 2 Prob. & Matr. 339.
(*o*) Paul *v.* Paul, L. R., 2 Prob. & Matr. 93.
(*p*) March *v.* March, L. R., 1 Prob. & Matr. 440.
(*q*) Johnson *v.* Johnson, 31 Law J., Prob. & Matr. 29. Pearce *v.* Pearce, 30 ib. 182. Horne *v.* Horne, ib. 200. If the fund is in the Court of Chancery, application must be made to such court to carry out the order. Pratt *v.* Jenner, L. R., 1 Ch. App. 493.

or alter the marriage-settlements(*r*). The court will not, at the prayer of an adulterous wife, deprive an innocent husband of any interest he takes under a settlement, however much it may benefit the children of the marriage(*s*). In making an order under the above section, the court will take into consideration the conduct of the parties, as well as their pecuniary position(*t*).

1252 *Orders respecting the custody of children.*—In any suit or proceeding for obtaining a judicial separation, or a decree of nullity of marriage, and on any petition for dissolving a marriage, the court may from time to time, before making its final decree, make such interim orders(*u*), and may make such provision in the final decree, as it may deem just and proper with respect to the custody, maintenance, and education of the children, the marriage of whose parents is the subject of such suit or other proceeding, and may, if it shall think fit, direct proper proceedings(*v*) to be taken for placing such children under the protection of the Court of Chancery, 20 & 21 Vict. c. 85, s. 35. The power of the court under this section of dealing with the custody of and access to children exists only where there is a suit for obtaining a judicial separation, a decree of nullity, or of dissolution of marriage. Where a petition for dissolution of marriage, therefore, is dismissed, the court has no power to make an order as to the custody of, or access to, the children of the marriage(*w*). The words, "just and proper," are to be construed with reference to the circumstances affecting the suit, and not merely with reference to the rules by which courts of equity and of common law have been governed in questions respecting the custody of infants(*x*).

The above Act only applied to orders made before or as part of the final decree, but by the 22 & 23 Vict. c. 61, s. 4, it is enacted, that *after* a final decree of judicial separation, nullity of marriage, or dissolution of marriage, the court may, upon application (by petition) for this purpose, make, from time to time, all such orders and provisions with respect to the custody, maintenance, and education of the

(*r*) Dempster *v.* Dempster, 31 Law J., Prob. & Matr. 113. Thomas *v.* Thomas, 2 Sw. & Tr. 89. Corrance *v.* Corrance, L. R., 1 Prob. & Matr. 495. Graham *v.* Graham, L. R., 1 Prob. & Div. 711. Sykes *v.* Sykes, L. R., 2 Prob. & Div. 163.

(*s*) Thompson *v.* Thompson, 32 Law J., Prob. & Matr. 89. See Smith *v.* Smith, L. R., 1 Prob. & Div. 587.

(*t*) Chetwynd *v.* Chetwynd, L. R., 1 Prob. & Div. 39. March *v.* March, *supra*.

(*u*) Thompson *v.* Thompson, 31 Law J., Prob. & Matr. 213.

(*v*) Milford *v.* Milford, 38 Law J., Prob. & Matr. 63.

(*w*) Seddon *v.* Seddon, 31 Law J., Prob. & Matr. 101.

(*x*) Marsh *v.* Marsh, 28 lb. 16; 2 Sw. & Tr. 276. See Chetwynd *v.* Chetwynd, L. R., 1 Prob. & Div. 39. Barnes *v.* Barnes, lb. 463.

children, the marriage of whose parents was the subject of the decree, or for placing such children under the protection of the Court of Chancery, as might have been made by such final decree, or by interim orders, in case the proceedings for obtaining such decree were still pending; and all orders under this enactment may be made by the Judge Ordinary alone, or with one or more of the other judges of the court(*y*). In the interval between a decree nisi for dissolution of marriage being pronounced and its being made absolute, the only order the court can make as to the custody of children, is an interim order under s. 35 of 20 & 21 Vict. c. 85(*z*).

The court under these statutes has no greater power over infants than parents themselves have at common law. It cannot, therefore, interfere with the liberty of children where the parents themselves, if living together unsuspected, could not interfere with it. It may order maintenance for children up to the age of twenty-one, for that is conferring a benefit upon them, but it cannot control them in the free choice of a residence after the age of sixteen(*a*). Up to that age, however, it has jurisdiction under s. 35 to make orders as to their custody(*b*).

When a wife has been proved to have been guilty of adultery, the court will not give her access to, or the custody of, the children of the marriage(*c*). It is otherwise as to access in the case of cruelty only(*d*).

In all suits and proceedings, other than proceedings to dissolve any marriage, the court is to proceed and give relief (s. 22 of 21 & 22 Vict. c. 108), on principles and rules as nearly as may be conformable to the principles and rules on which the ecclesiastical courts have hitherto acted and given relief.

As, in the ecclesiastical courts, acts of cruelty to children, committed in the presence of the mother, have, in some instances, been held cruelty to her, such acts may be alleged in a petition to the Divorce Court, praying for a judicial separation on the ground of cruelty, and also for an order respecting the custody of the children of the marriage; but at the hearing the court will confine the inquiry to the conduct of the husband and wife. In the majority of cases, enough will come out in the course of the inquiry to enable the court to give directions as to the custody of the children, and where this is not the case the

(*y*) Webster *v.* Webster, 31 Law J., Prob. & Matr. 134. Milford *v.* Milford, L. R., 1 Prob. & Matr. 715.
(*z*) Cubley *v.* Cubley, 31 Law J., Prob. & Matr. 161.
(*a*) Ryder *v.* Ryder, 30 ib. 44.
(*b*) Mallinson *v.* Mallinson, L. R., 1 Prob. & Div. 221.
(*c*) Bent *v.* Bent, 30 Law J., Prob. & Matr. 175. Clout *v.* Clout, ib. 178.
(*d*) Bacon *v.* Bacon, L. R., 1 Prob. & Div. 167.

court will require further evidence to be given before making any decree(*e*). The court will not deal with a petition for custody of children under the 22 & 23 Vict. c. 61, s. 4, until both parties are before it(*f*).

*1253 *Of the common law right of fathers to the custody of their infant children.*—Every father has a right by the common law to the exclusive custody of his legitimate infant children, although they be within the age of nurture(*g*), and with this right the Court of Probate and Divorce will not interfere under the Acts we have just been considering, unless the father is notoriously leading a dissolute life(*h*), or there are other circumstances rendering the transfer of them to the custody of the mother just and proper(*i*). If the father has been deprived of the custody of his children, it will be restored to him both by the courts of common law and the Court of Chancery (*post*, s. 2), so long as he has not by immorality and misconduct disqualified himself from being the legal guardian of his children, and forfeited his claim to the assistance of the court. A contract by the father for the abandonment of these rights, and for the maintenance and education of the child by a relation, or any other person, does not prevent him from claiming the custody of the child, and requiring the child to be delivered up to him(*j*). But when a parent has committed the care of an infant child to a relation who has brought it up, and had the guardianship and control of it for a lengthened period, the Court of Chancery will not interfere, and will not compel the restoration of the child to the parent, if the effect of the proceeding would be productive of serious injury to the position and prospects of the child(*k*).

Whenever an infant is in the custody of the mother, or of any third party, the courts of common law will compel her or the person having the child to deliver it into the custody of the father, unles it appears to the court that the child will be improperly restrained, or its morals contaminated, by being placed in the father's custody(*l*).

(*e*) Suggate *v.* Suggate, 28 Law J., Prob. & Matr. 46.
(*f*) Stacey *v.* Stacey, 29 Law J., Prob. & Matr. 63. Browne's Div. Pract., 2nd ed., p. 125, *et seq.*
(*g*) Cartledge *v.* Cartledge, 31 Law J., Prob. & Matr. 85.
(*h*) March *v.* March, L. R., 1 Prob. & Matr. 437.
(*i*) See Barnes *v.* Barnes, *ante*, p. 1072.
(*j*) Reg. *v.* Smith, 23 Law J., Q. B. 116.
(*k*) Lyons *v.* Blenkin, Jac. 245. Preston, *In re*, 5 D. & L. 238; 17 Law J., Q. B. 221. Fynn, *In re*, 2 De Gex & Smale, 457; Anon. 2 Sim. N. S. 54.
(*l*) Cresswell, J., Hakewell, *In re*, 13 C. B. 239. M'Clellan, *Ex parte*, 1 Dowl. P. C. 81; 13 C. B. 680.

The power of the father over the child seems to be subordinate, even in a court of common law, to the higher interest of the state; so that the court will not interfere in favor of a father who has been convicted of felony, and who is manifestly an improper person to have the guardianship of the infant(*m*). The courts of common law have authority to restore the father to his rights, but they have no power to compel him to perform his duty.

Although a father is entitled to have the custody of his children up to their attaining the age of twenty-one years, the courts of law will not interfere, by *habeas corpus*, to withdraw a female child from the custody of persons with whom it may be, and hand it over to the custody of the father, if the child has attained the age of sixteen years. Up to that age, a female child is not entitled to withdraw herself from the father's protection, when there is nothing to show that he will not exercise proper parental care and protection over her; and persons who induce girls to leave their fathers before that age incur great danger of being convicted of abduction(*n*). Parental control, however, ceases at the age of sixteen, so that a girl, after that age, has a right to say that she will not be controlled by either, or by both parents, as to where, or with whom, she will live(*o*).

1254 *Right of guardians for nurture to the custody of infant children.*—Guardianship for nurture continues until the child has attained the age of fourteen years, and a guardian for nurture may, by *habeas corpus*, get possession of the child during that period, unless it be shown that he is scandalously immoral, or wants the child for an improper purpose(*p*), for every guardian for nurture has by law a right to the custody of the child(*q*).

1255 *Inability of courts of common law to interfere with the right of the father to the custody of his children.*—The courts of common law have professed themselves incompetent to control the right of the father to the custody of his infant children, and have decided that they have no power to interfere to take an infant child from the custody of its father, except for the purpose of preventing improper and unjustifiable restraint of the person of the child, and protecting it from personal ill-usage and gross cruelty. Thus, where an Englishwoman married a Frenchman, and then separated herself from him on account, as she

(*m*) Blisset's case, Lofft., 748. Rexv. Wilson, 4 Ad. & E., 645, n. Bailey, *Ex parte*, 6 Dowl P. C. 311.
(*n*) Reg. *v.* Howes, 30 Law J., M. C. 47. Reg. *v.* Timmins, ib. 45.
(*o*) Ryder *v.* Ryder, 30 Law J., Prob. & Matr. 44.
(*p*) Race, *In re*, 26 Law J., Q. B. 169.
(*q*) Com. Dig. Guardian (D).

alleged, of ill-treatment, taking with her her infant at the breast, only eight months old, and the foreign husband came to her house, seized the child, carried it away with him half naked in inclement weather, the Court of Queen's Bench held that it could not interfere for the purpose of taking the child from the father and restoring it to the mother, as the father had by the common law an undoubted right to the custody of his child(*r*). And the courts of common law have decided that they have no jurisdiction to interfere to take a child out of the custody of its father, although the father's cruelty to the mother has rendered it impossible for her to live with him, and he is himself confined in gaol, and cohabiting there with a profligate woman, who takes the child daily to the prison to see him(*s*).

1256 *Of the controlling power of the Court of Chancery over the father's right to the custody of his infant children.*—The Court of Chancery, on the other hand, representing the sovereign as *parens patriæ*, exercises a general control over the maintenance and education of all the Queen's subjects within its jurisdiction, and will restrain the father from acquiring possession of the person of his infant children when he has deserted their mother, and has by immoral conduct proved himself to be unfit to have the guardianship of them, and the interference of the court is necessary to protect the child from temporal ruin or spiritual peril(*t*). When the conduct of the father has been such as to render it impossible that the wife can live with him, and the court has therefore the duty cast upon it of deciding whether the children shall be brought up by one parent or the other, it will adopt that custody which seems best for the interests of the children.

The grounds upon which the court has deprived a father, who has deserted, or driven away his wife, of the custody of his children, and placed them under the care of the mother, or a guardian appointed by the court, are, notorious impiety and irreligion, profligacy and adultery(*u*), teaching the children to swear, and introducing them to low company and immoral companions(*v*); the public avowal by the father of his being an atheist, and the publication by him of books deriding the truth of the Christian revelation and denying the existence of God(*w*). There are no bounds to the interference of the Court

(*r*) Rex *v.* De Manneville, 5 East, 221.
(*s*) Skinner, *Ex parte*, 9 Moore, 278. Rex *v.* Greenhill, 6 N. & M. 265; 4 Ad. & E. 624.
(*t*) Thomas *v.* Roberts, 3 De Gex & Smale, 781; 19 Law J., Ch. 506. Creuze *v.* Hunter, 2 Cox, 242.
(*u*) Shelley *v.* Westbrooke, Jac. 266. Warde *v.* Warde, 2 Phill. 791.
(*v*) Wellesley *v.* Wellesley, 2 Bligh, N. S. 124.
(*w*) Shelley *v.* Westbrooke, Jac. 266.

of Chancery with the rights of the father to the custody of his children, whenever his misconduct has brought about a separation between himself and the mother of those children, and his natural rights to the custody of them clash with their true interests; but it is a jurisdiction which the court is extremely reluctant to exercise(*x*), and it will not be exercised upon the mere consideration of what may be manifestly for the benefit of the children.

Before the jurisdiction can be called into action, the court must be satisfied, not only that it has the means of acting safely and efficiently, but that the father has so conducted himself as to render it essential to the safety of the children, or to their welfare in some very serious respect, that his acknowledged rights should be superseded or interfered with(*y*). The mere fact of the father's having committed adultery, or of his keeping up an adulterous intercourse and being separated from his wife, has been held not to be sufficient of itself to warrant the interference of the court with his natural right to the custody of his children(*z*). But it is now competent to the Divorce Court, whenever a decree has been pronounced for a judicial separation by reason of the adultery of the husband, to order the infant children of the marriage to be placed under the custody of the mother (*ante*, pp. 1072, 1073).

When the Court of Chancery is compelled, in consequence of the profligacy or immorality of the father, to remove female children from the contamination of his example, it will not accompany that measure with the great evil of separating one portion of the family from the other; "for if one child were to be brought up by the father and the other by the mother, that very circumstance would create factions in the family, which it is the bounden duty of the court, as far as possible, to guard against"(*a*).

1257 *Jurisdiction of the Court of Chancery over the custody of the children of British subjects born abroad.*—According to the doctrine of our law, the sovereign, as *parens patriæ*, has an interest in the maintenance and education of all its subjects, whether they be resident within the realm or domiciled abroad. The child of a British father, born abroad, is a British subject, and is, to all intents and purposes, to be deemed as if born in England; and the Court of Chancery, as representing the sovereign, will afford its aid, when requisite, in favor of the children

(*x*) Ld. Cranworth, Hope *v.* Hope, 23 Law J., Ch. 689.
(*y*) *Re* Curtis, 28 Law J., Ch. 458.
(*z*) Ball *v.* Ball. 2 Sim.
(*a*) Warde *v.* Warde, 2 Phill. 791.

of British subjects born abroad. Relief may be sought, and the jurisdiction of the court exercised, on behalf of an infant that is not, at the time the jurisdiction is asked for, within the control of the court. It may be that a child is out of the jurisdiction under such circumstances, that no jurisdiction can be exercised because no order can be enforced; and in such a case there is not a want of jurisdiction, but a want of power of enforcing jurisdiction. If persons abroad have property here, the court will proceed against that property to enforce obedience to its decrees(*b*).

1258 *Jurisdiction of the Court of Chancery over the children of foreigners in this country.*—The Court of Chancery exercises the same jurisdiction over the custody of foreign children in this country that it does over native children; and the reason is, that foreign children, as well as foreign adults, owe allegiance to the crown, and are, to a certain extent, subjects of the crown, as long as they are in this country(*c*). But, although guardians in this country have been appointed, the court will not from any considerations of supposed benefit to foreign infants, interfere with the discretion or custody of a guardian who has been appoined by a foreign court of competent jurisdiction, and who wishes to remove them back to their native country to complete their education there(*d*).

1259 *Right of access of mothers to their infant children and to the custody of children under seven years of age.*—The 2 & 3 Vict. c. 54, s. 1, enables the Lord Chancellor and the Master of the Rolls, upon the petition of the mother of any infant in the sole custody or control of the father, or of any person by his authority, or of any guardian after the death of the father, to make order for the access of the petitioner to such infant, at such times, and subject to such regulations as he shall deem just. The Lord Chancellor and the Master of the Rolls are also empowered (ss. 3, 4), on the petition of the mother of any infant under the age of seven years, to order that such infant shall be delivered to, and remain in the custody of, the mother, until the infant attains that age; but no order is to be made in favor of any mother against whom adultery shall be established. This statute does not destroy the right of the father to the sole custody of his infant child, but introduces new elements and considerations under which that right is to be exercised. "The Act," observes Sir G. Turner, V.C., "proceeds upon three grounds.

(*b*) Hope *v.* Hope, 23 Law J., Ch. 686.
(*c*) Hope *v.* Hope, 23 Law J., Ch. 688; 2 Eq. R. 1047, *S. C.*
(*d*) Nugent *v.* Vetzera, L. R., 2 Eq. Ca. 704. See Foster *v.* Denny, 2 Ch. Ca. 237.

First, it assumes and proceeds upon the existence of the paternal right. Secondly, it connects the paternal right with the marital duty, and imposes the marital duty as the condition of recognizing the paternal right. Thirdly, the Act regards the interest of the child, for on no other grounds can I account for the distinction taken between the cases of children above and under seven years of age. These three grounds, then—the paternal right, the marital duty, and the interest of the child—are to be kept in mind in deciding any case under this statute." Unless there has been a clear neglect by the father of his duty as a husband in some important particular affecting the interests of the child, the court will not deprive him of his right to the custody of it; nor will it interfere to give the wife access to the child if it be proved that she is an habitual drunkard, or that intercourse between the mother and child would be likely to be prejudicial to the interests of the child(*e*). Although the child is, at the time of the presentation of a petition by the mother, and continues to be in the custody of the mother, the Court of Chancery has, within the equity of the Act, jurisdiction to interfere(*f*).

1260 *Of the right of the mother to the custody of her children on the death or transportation of the father.*—On the death of the father, the surviving mother has an absolute right to the custody of her infant children(*g*), and if the father is convicted of felony, and sentenced to be transported, the courts of common law will grant a *habeas corpus* to bring up the infants, that they may be delivered to the mother(*h*).

1261 *Of the obligation of parents to provide for their children.*—By the common law, a father who gives no authority to another, and enters into no contract, is no more liable for goods supplied to his child than a brother, or an uncle, or a mere stranger would be. "In order to bind a father in point of law for a debt incurred by his son, you must prove that he has contracted to be bound, just in the same manner as you would prove such a contract against any other person"(*i*); but the 43 Eliz. c. 2, s. 7, for the relief of the poor, provides that the father and grandfather, and mother and grandmother, and the children of every poor, old, blind, lame and impotent person, or other poor person not able to work, being of sufficient ability, shall at their own charges,

(*e*) Halliday, *In re*, 17 Jur. 56.
(*f*) Tomlinson, *In re*, 3 De G. & Sm. 372.
(*g*) 2 & 3 Vict. c. 54, s. 1.
(*h*) Bailey, *Ex parte*, 6 Dowl. P. C. 311.
(*i*) Ld. Abinger, Mortimore *v.* Wright, 6 M. & W. 487. See Ruttinger *v.* Temple, 33 Law J., Q. B. 1; 4 B. & S. 491. Where the child is living with its mother, under an order of the Court of Chancery, see Bazeley *v.* Forder, L. R., 3 Q. B. 559.

relieve and maintain every such poor person; and the 4 & 5 Wm. 4, c. 76, s. 56, provides, that all parish relief given to the wife or to a child under the age of sixteen, not being blind, or deaf, or dumb, shall be considered as given to the husband or parent, as the case may be, and may be treated (s. 58) as a loan to the latter, and may be recovered in the mode thereby appointed (s. 59). A child left to starve, therefore, must apply to the parish, and the parish will compel payment of subsistence-money from the parent(*k*).

1262 *Evidence on the hearing of petitions—Competency of the husband and wife to give evidence.*—By the 32 & 33 Vict. c. 68, the exception contained in the 14 & 15 Vict, c. 99, s. 4, and 16 & 17 Vict. c. 83, s. 2, as to husbands and wives not being competent or compellable to give evidence against each other "in any proceeding instituted in consequence of adultery"(*l*), is repealed(*m*), and the 3rd section of the first-mentioned Act provides that the parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence, provided that no witness, whether a party to the suit or not, shall be bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness has already given evidence in disproof of his or her alleged adultery. But this provision is for the protection of the witness only; if, therefore, the witness is willing to give evidence, counsel cannot exclude it(*n*).

Previously to the first mentioned Act it was enacted by the 22 & 23 Vict. c. 61, s. 6, that on any petition presented by a wife praying that her marriage might be dissolved by reason of her husband having been guilty of adultery coupled with cruelty, or of adultery coupled with desertion, the husband and wife respectively should be competent and compellable to give evidence of or relating to such cruelty or desertion. And it was held, that when once in the witness-box upon those issues they might be cross-examined, and therefore re-examined, upon the issues of their own and of each other's adultery respectively(*o*).

1263 *Trial of questions of fact before a jury.*—By 20 & 21 Vict. c. 85, s. 28, it is enacted, that either of the parties to a petition praying for the dissolution of the marriage may insist on having the contested matters

(*k*) Skelton *v.* Springett, 11 C. B. 452. See The Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), s. 14.

(*l*) See Blackborne *v.* Blackborne, L. R., 1 Prob. & Div. 563.

(*m*) See *Re* Rideout's Trusts, L. R., 10 Eq. Ca. 41.

(*n*) Hebblethwaite *v.* Hebblethwaite, L. R., 2 Prob. & Div. 29.

(*o*) Boardman *v.* Boardman, L. R., 1 Prob. & Div. 233.

of fact tried by a jury; and by s. 36 it is further enacted, that in all questions of fact arising in proceedings under the Act it shall be lawful for, but, except as thereinbefore provided (and above stated), not obligatory upon, the court to direct the truth thereof to be determined before itself, or before any one or more of the judges of the court, by the verdict of a special or common jury. In a suit for a judicial separation the parties cannot, as in a suit for dissolution of marriage, demand, as a matter of right, that the issues of fact be tried by a jury; but the court has a discretionary power, under the above section, to grant or refuse the application for a jury. It will generally, however, on the application of either party, direct questions of fact to be tried by a jury(*p*). And in cases which have to be tried before the full court, in which there is likely to be any considerable controversy as to the facts, trial by jury will generally be directed(*q*). Upon the trial of any question of fact before a jury, the court or judge has (s. 38) the same power, jurisdiction, and authority as any judge of any of the superior courts sitting at *nisi prius*. A bill of exceptions may be tendered, and a general or special verdict, subject to a special case, may be returned as in causes tried in the superior courts, and the matter of law heard and determined by the full court, subject to such right of appeal as is given by the statute (s. 39).

1264 *Petitions for damages from adulterers.*—By the 20 & 21 Vict. c. 85, s. 59, the action for criminal conversation is abolished, but by s. 33, it is enacted, that any husband may either in a petition for dissolution of marriage, or for judicial separation, or by petition only, claim damages from any person on the ground of his having committed adultery with the wife of such petitioner, and such claim is to be heard and tried on the same principles, in the same manner, and subject to the same or the like rules and regulations as actions for criminal conversation were formerly tried and decided in courts of common law(*r*), and the damages to be recovered are in all cases to be ascertained by the verdict of a jury, although the respondents or either of them may not appear.

1265 *Evidence at the trial of a claim for damages for adultery—Proof of the marriage.*—In order to establish a *primâ facie* case for damages from a defendant who is charged with having committed adultery with the claimant's wife, it is necessary to prove a legal marriage between

(*p*) Marchmont *v.* Marchmont, 27 Law J., Prob. & Matr. 59.
(*q*) Ratcliffe *v.* Ratcliffe, ib. 60.
(*r*) See Seddon *v.* Seddon, 30 Law J., Prob. & Matr. 12.

the claimant and the woman alleged to be his wife(*s*). It is not enough to show that he and his alleged wife intended to celebrate, and did, in their belief celebrate, a lawful and formal marriage, and did afterwards cohabit as man and wife upon the faith of this *bonâ fide* belief, for the burthen is on him to prove a clear legal marriage, whereby the relation of husband and wife is really created; and a mere proof of the ceremony which the parties suppose to be sufficient to constitute that relation, is not enough. It must be shown to be sufficient according to law for that purpose(*t*).

1266 *Proof of marriage by certified extracts from parochial registers of marriages.*—The 52 Geo. 3, c. 146, formerly provided (ss. 1–5) for the making and keeping, by the rector, vicar, curate, or officiating minister of every parish or chapelry where marriages, etc., have been celebrated according to the rights of the Established Church, of a public register of such marriages, and for the transmission (ss. 6, 7) of annual copies of such registers to the registrar of the diocese, and for the making and preserving (s. 12) of alphabetical lists and indexes, to be open to public search at all reasonable times, on payment of the usual fees. But this statute, so far as it relates to the registration of marriages, has been repealed by 6 & 7 Wm. 4, c. 86, which provides (s. 2) a general register office in London for keeping a register of marriages, etc., and provincial registers (s. 9) in every union. Marriage-register books are to be furnished to the rector, vicar, or curate of every church or chapel, and to the registering officers of the various bodies of Dissenters, in whose chapels marriages are celebrated (s. 30), who are required (s. 31) to register therein all marriages, and forward (s. 33) certified copies thereof to the superintendent registrars, who are to send them (s. 34) to the Registrar-General, to be arranged for public inspection. By s. 35 it is enacted, that every rector, vicar, or curate, and every registrar, registering office, and secretary, who shall have the keeping for the time being of any register book of marriages, etc., shall at all reasonable times allow searches to be made of any register-book in his keeping, and shall give a certified copy under his hand, of any entry or entries in the same, on payment of certain specified fees. Provision is also made for searches at the superintendent registrar's (s. 36), and the General Register Office (s. 39); and for the issue of certified copies under the hand of the superintendent

(*s*) Brown's Div. Pract. 2d ed., p. 124.

(*t*) Catherwood *v.* Caslon, 13 M. & W. 265; 13 Law J., Exch. 334. Morris *v.* Miller, 1 W. Bl. 632; 4 Burr. 2057.

registrar (s. 36), and under the seal of the Registrar-General. And all certified copies of entries, purporting to be sealed or stamped with the seal of the General Register Office, are to be received as evidence without any further or other proof of such entry; and no certified copy purporting to be given in the said office, which is not sealed or stamped as aforesaid, is to be of any force or effect.

1267 *Proof of marriage through the medium of examined copies and certified extracts from non-parochial registers.*—The 6 & 7 Wm. 4, c. 85, also provides (s. 4) for notices of intended marriages to be given to the Superintendent Registrar of Marriages(*u*), who is (s. 5) to file such notices, and to furnish therefrom to the Registrar-General a book, to be called "the Marriage-Notice Book," which is to be open at all reasonable times to persons desirous of inspecting it. Provision is made for the appointment of registrars of marriages, for registering (s. 18) places of worship for the solemnization of marriages in the presence (s. 20) of the registrar; for the registration (s. 23) of such marriages; for the making and delivering (s. 24) certified copies of the entries of marriage in the register to the superintendent registrar, to be kept by him with the records of his office. And by the 3 & 4 Vict. c. 92, and 21 & 22 Vict. c. 25, ss. 1 & 2, provision is made for the verification and deposit in the custody of the Registrar-General of various non-parochial registers of marriages, etc., for the framing of lists of all such records and registers; for the making of searches, and the grant (3 & 4 Vict. c. 92, s. 5,) of certified extracts: also (s. 6) for the production in courts of justice of such original registers and records; for the issue (s. 9) of certified extracts therefrom, sealed with the seal of the General Register Office; for the admission of such certified extracts on the trial of causes, but not on criminal trials (s. 11), after notice given to the opposite party, in sufficient time before the trial to enable him to inspect the original register or record; also (s. 12) for the use of the original register or record in evidence after notice. In criminal cases, the original register or record is required (s. 18) to be produced, and notice given of the intention to use it.

Marriages of British subjects solemnized abroad, may be proved through the medium of certified copies of the consular registers, which are transmitted annually to the Registrar-General(*x*). A marriage in India may be established by an authenticated copy of the register of

(*u*) See Holmes *v.* Simmons, L. R., 1 Prob. & Div. 523.

(*x*) 12 & 13 Vict. c. 68, ss. 11, 12, 18. As to the inadmissibility of a certificate of a foreign marriage, Abbott *v.* Godoy, 29 Law J., Prob. & Matr. 57.

marriages kept in India by public authority and transmitted to this country(*y*).

By 19 & 20 Vict. c. 119, s. 24, the Registrar-General is required to give to any one demanding the same a certified copy of the returns made to him, or an extract therefrom, with respect to any place of meeting for religious worship contained therein.

Marriages, therefore, may be proved by a copy or extract from the register, purporting to be signed and certified as a true copy or extract by the parish-officer, whether incumbent, rector, vicar or curate, who has the custody of such register(*z*). And the identity of the claimant and his wife with the parties named in the register, as having been married at the time and place therein mentioned, may be proved by any person who was present at the ceremony, or by any evidence sufficient to satisfy a jury of their identity(*a*).

The fact of the marriage may also be proved by the testimony of an eye-witness of the ceremony, without the production of any examined or certified extract from the register(*b*). Where a witness deposed that he was present in a Wesleyan chapel, and that a form of marriage was there celebrated between *A* and *B*, in the presence of the registrar of marriages, and spoke to all the circumstance attending the ceremony, the entry in the registrar's book, a copy of which was produced at the trial, it was held that this was *prima facie* evidence of the due solemnization of a marriage between the parties in a duly registered chapel, in which marriages might be legally solemnized(*c*). Such formal proof as the above, however, is not in all cases necessary, for where, in a suit for dissolution, the evidence was, that the parties left a certain place in order to be married, that they returned and stated that they had been married, and subsequently lived together as man and wife for many years, it was held sufficient(*d*); the presumption in favor of marriage in such and similar cases being very strong(*e*).

1268 *Of the damages recoverable in cases of adultery.*—The injury suffered by the husband from the seduction of his wife depends upon the circumstances and situation in life of the husband at the time of the

(*y*) Ratcliffe *v.* Ratcliffe, 29 Law J., Prob. & Matr. 202.
(*z*) *Re* Hall's Estate, 22 Law J., Ch. 177; 14 & 15 Vict. c. 99, s. 14.
(*a*) Birt *v.* Barlow, 1 Doug. 174. See Hubbard *v.* Lees, L. R., 1 Exch. 255.
(*b*) St. Devereux *v.* Much Dew Church 1 W. Bl. 367.
(*c*) Reg. *v.* Mainwaring, 26 Law J., M. C. 11. See Sichel *v.* Lambert, 33 Law J., C. P. 137.
(*d*) Patrickson *v.* Patrickson, L. R., 1 Prob. & Div. 86. As to the proof of a foreign marriage, see Finlay *v.* Finlay, 31 Law J., Prob. & Matr. 149.
(*e*) See Gompertz *v.* Kensit, L. R., 13 Eq. Ca. 369.

seduction, upon the mode in which he fulfilled his marital duties, the terms upon which the husband and wife were living together, and upon the general character of the wife at the time she was led astray. These are circumstances for the proper and sole cognizance of the jury, and the court will not interfere with their estimate of damages unless it is manifestly and palpably outrageous(*f*). Where the plaintiff's wife had not been criminally connected with the defendant alone, Lord Ellenborough directed the jury to award damages proportioned to so much of the plaintiff's loss of comfort, etc., as they might suppose to have been occasioned by the defendant's misconduct, and not to give damages for the whole of the injury that the plaintiff had sustained(*g*). So, proof of adulterous intercourse between the wife and other men prior to the commission of the adultery with the defendant, may be given in evidence in reduction of damages, for the purpose of showing that the claimant has lost a wife who was worth nothing(*h*).

A voluntary separation was no bar formerly to the husband's claim for damages in an action of crim. con.(*i*), but it may be now under the Divorce Act, if it amount to such misconduct as would induce the court in the exercise of its discretion, under s. 31, to dismiss the petition, and is properly pleaded(*k*). If the claimant connived at the adulterous intercourse(*l*), or if he suffered or encouraged his wife to live in a state of prostitution, he could not, before the passing of the Divorce Act, come into a court of justice to ask for damages. His having suffered such connection with other men, was equally a bar to the action as if he had permitted the defendant to be connected with her(*m*). But the infidelity of the husband was held to constitute no bar to his claim for damages from the adulterer, although it might be given in evidence in mitigation of damages(*n*). All these circumstances, however, may now be pleaded as a defence to the petition for the dissolution of the marriage, as above stated, and if not so pleaded they are inadmissible(*o*). If, however, they do not amount to a defence within the above section, they would, semble, be admissible

(*f*) Wilford *v.* Berkeley, 1 Burr. 609. Duberley *v.* Gunning, 4 T. R. 657.
(*g*) Gregson *v.* Theaker, 1 Campb. 415, n.
(*h*) Alderson, J., Winter *v.* Henn, 4 C. & P. 498. Forster *v.* Forster, 33 Law J., Prob. & Matr. 150, n.
(*i*) Chambers *v.* Caulfield, 6 East, 256.
(*k*) Seddon *v.* Seddon, 30 Law J., Prob. & Matr. 12.
(*l*) Cibber *v.* Sloper, cited 4 T. R. 655.
(*m*) Per Ld. Kenyon, Hodges *v.* Windham, 1 Peake, 54.
(*n*) Bromley *v.* Wallace, 4 Esp. 237.
(*o*) Plumer *v.* Plumer, 29 Law J., Prob. & Matr. 63; S. & S. 147, *S. C.*

in mitigation of damages, for, previous to the passing of the Divorce Act, it might be shown in mitigation of damages that the husband neglected his wife, or treated her with coldness, and as a person whom he did not esteem or regard; also that the marriage was kept secret, and that the wife was allowed to live with her mother, and pass as a single woman, and that she was not known by the defendant to be married at the time of the commission of the adultery(*p*).

When the husband and wife are separated from each other the wife's letters to her husband are admissible in evidence for the purpose of showing the state of her affections at the time of the writing of the letters; but to remove all grounds for any suspicion of collusion between the husband and wife, it should be proved that the letters were written at the time they bear date, and before there was any knowledge or suspicion of the adulterous intercourse(*q*). Such letters are not to be rejected merely because they contain statements of specific facts calculated to inflence the minds of the jury, and which was not strictly evidence. But the jury must be cautioned not to allow themselves to be influenced by the particular facts alluded to(*r*).

1269 *Evidence of the defendant's circumstances or property* has been held to be inadmissible for the purpose of enhancing the damages, it being considered that the jury ought to give compensation for the injury sustained without reference to the wealth of the defendant(*s*). But if the co-respondent has used his wealth for the purpose of seducing the respondent, the jury may, it seems, take it into consideration in assessing the damages(*t*). Evidence of the humble condition in life, and of the poverty of the defendant, has been received in mitigation of damages, for the purpose of showing that the allurements and temptations to the commission of the adultery, did not emanate from the defendant. Letters, also, written by the claimant's wife before the commission of the adultery, soliciting the defendant's addresses, and enticing him into the adulterous connexion, are admissible in evidence in mitigation of damages, but not proofs of misconduct subsequent to the commission of the adultery(*u*).

1270 *Application of the damages recovered—Payment of costs*(*x*).—After

(*p*) Calcraft *v.* Earl Harborough, 4 C. & P. 501.
(*q*) Trelawney *v.* Coleman, 1 B. & Ald. 90; 2 Stark. 191. Edwards *v.* Crook, 4 Esp. 38.
(*r*) Willis *v.* Bernard, 1 M. & Sc. 584; 8 Bing. 376.
(*s*) Alderson, B., James *v.* Biddington, 6 C. & P. 590.
(*t*) Cowing *v.* Cowing, 33 Law J., Prob. & Matr. 149.
(*u*) Elsam *v.* Faucett, 3 Esp. 562.
(*x*) See West *v.* West, L. R., 2 Prob. & Div. 196.

verdict, or decree, the Court for Divorce and Matrimonial Causes is to direct in what manner the damages are to be applied(*y*), and is empowered to settle the whole, or any part thereof, for the benefit of the children (if any) of the marriage, or as a provision for the maintenance of the wife(*z*). And whenever, in any petition presented by a husband, the alleged adulterer shall have been made a co-respondent, and the adulterer shall have been established, the court may order the adulterer to pay the whole or any part of the costs of the proceeding(*a*); or, if no sufficient justification has been proved for making him a co-respondent(*b*), or the husband has connived at the adultery(*c*), may order the husband to bear his own costs. But, where the Court of Appeal has exercised its discretion with regard to costs, the Judge Ordinary will not interfere(*d*). Under certain circumstances the wife will have to bear her own costs(*e*) as well as those of her husband(*f*). The payment of costs may be enforced by writ of sequestration(*g*).

SECTION II.

OF SEDUCTION.

1271 *Of the harboring of married women and inducing them to live apart from their husbands.*—Every person who receives a married woman into his house, and suffers her to continue there after he has received notice from the husband not to harbor her, is liable to an action for damages, unless the husband has, by his cruelty or misconduct, forfeited his marital rights, or has turned his wife out of doors, or has, by some insult or ill-treatment, compelled her to leave him. Where a married woman came to the defendant's house and represented herself to have been very ill-used by her husband, who, she said, had turned

(*y*) See Patterson *v.* Patterson, L. R., 2 Prob. & Div. 189.
(*z*) Bent *v.* Bent, 30 Law J., Prob. & Matr. 175. Bellingay *v.* Bellingay, L. R., 1 Prob. & Div. 168.
(*a*) 20 & 21 Vict. c. 85, ss. 33, 34.
(*b*) Whitmore *v.* Whitmore, L. R., 1 Prob. & Div. 25. And see Conradi *v.* Conradi, ib. 163.
(*c*) Adams *v.* Adams, L. R., 1 Prob. & Div. 333.
(*d*) L—— *v.* H——, L. R., 1 Prob. & Div. 293.
(*e*) Heal *v.* Heal, L. R., 1 Prob. & Div. 300.
(*f*) Miller *v.* Miller, L. R., 2 Prob. & Matr. 13. Milne *v.* Milne, ib. 203. See Wait *v.* Wait, ib. 238.
(*g*) Dent *v.* Dent, L. R., 1 Prob. & Div. 366. Miller *v.* Miller, L. R., 2 Prob. & Div. 54

her out of doors, and upon this representation the defendant received her into his house, and suffered her to continue there after he had received notice from the husband not to harbor her, Lord Kenyon held that an action could not be maintained against him, as he appeared to have acted solely from principles of humanity(*h*), and that, if a husband ill-treats his wife, so that she is forced to leave his house through fear of bodily injury, any person may safely, nay honorably, receive her and protect her(*i*). Where the defendant persuaded and procured a wife to separate from her husband and live apart from him, it was held that he was responsible in damages to the latter, and that every moment a wife continues absent from her husband without his consent is a new tort, and every one who persuades her to do so does a new injury(*k*).

1272 *Of the seduction and loss of service of servants.*—Every person who knowingly and designedly interrupts the relation subsisting between master and servant by procuring the servant to depart from the master's service, or by harboring him and keeping him as servant, after he has quitted his place, and during the stipulated period of service, whereby the master is injured, commits a wrongful act, for which he is responsible in damages(*l*). And if a servant or apprentice quits his master or employer without just cause, before his term of service expires, and another retains and employs him against the will of the master, and with notice of his having deserted the service of the latter, an action for damages is maintainable against him, as the very act of giving the servant employment is affording him the means of keeping out of his former service(*m*).

A taskworkman, who contracts with another by the job or piece, is the servant of that other until the work is finished, and no other person can, whilst such work is going on and is unfinished, lawfully employ the servant, if by so doing, he causes him to leave his work unfinished, and has knowledge of the fact. Thus, where a journeyman shoemaker, living and working in his house, was employed by a shoe manufacturer to make a certain number of shoes at so much per

(*h*) Philp *v.* Squire, 1 Peake, 115.

(*i*) Berthon *v.* Cartwright, 2 Esp. 480. Barner *v.* Allen, 1 Keyes (N. Y.), 390. *S. C.*, 1 Abb. App. Dec. 111.

(*k*) Winsmore *v.* Greenbank, *ante*, p. 11. A wife may maintain an action against a third person for enticing away and harboring her husband. Clark *v.* Harlan, 1 Cinc. (Ohio) 418.

(*l*) Lumley *v.* Gye, 2 Ell. & Bl. 224. Peter *v.* Bloeker, 43 Ga. 331. Salter *v.* Howard, 43 Ga. 601. Walker *v.* Cronin, 107 Mass. 555. James *v.* LeRoy, 6 Johns. 274; Stout *v.* Woody, 63 N. C. 37.

(*m*) Blake *v.* Layton, 6 T. R. 221. Fawcett *v.* Beavres, 2 Lev. 63. Adams *v.* Bafeald, 1 Leon. 240. Hamilton *v.* Vere, 1 Lev. 299; 2 Saund. 169.

pair, to be completed by a given time, and the defendant took the man into his service, and thereby caused him to leave a number of shoes unfinished, and neglected to discharge him after having received notice from the plaintiff of the subsisting engagement between such workman and himself, he was held responsible in damages to the plaintiff for the injury(*n*). If the defendant has derived any benefit from the services of the servant or apprentice, the master is entitled to recover the value of it(*o*).

The master may maintain an action for compensation for the loss of the services of his servant through the tortious act of another, whether the servant be a child or not, provided it appear that the child was capable of rendering, and did render, some service, however trifling; but if no service was, or could be, performed by the child, an action is not maintainable. However, if the tortious act is in effect a breach of contract, *e.g.*, the neglect of a railway company to carry a servant, who is a passenger on their railway, safely, the master of the servant is not entitled to sue the railway company, for the contract is not with him(*p*).

1273 *Of injuries to parents in being deprived of the services of their children through the tortious act of another.*—A parent has no remedy for an injury done to his child by the wrongful act of another, unless the child is old enough to be capable of rendering him some act of service, and can be treated in law as his servant; but it is not necessary to allege or prove any contract of service beyond what the law will imply from the relationship of parent and child(*q*). Thus, where the plaintiff brought an action against the defendant for carelessly driving over and injuring the plaintiff's child, whereby the plaintiff was deprived of the service of the child, and was obliged to expend a large sum of money in doctors and nurses, and it appeared that the child was only two years and a half old, and incapable of performing any act of service, it was held that the action was not maintainable(*r*). If the father of a child incurs necessary expense in curing his child from an injury wrongfully inflicted by the defendant, he cannot recover those expenses upon a declaration describing, as the cause of action, the obligation of the father to incur that expense.

1274 *Of injuries to parents from the seduction of their daughters.*—The law

(*n*) Hart *v.* Aldridge, Cowp. 54. Bac. Abr. MASTER AND SERVANT (O).
(*o*) Foster *v.* Stewart, 3 M. & S. 201.
(*p*) Alton *v.* Midland Rail. Co., 34 Law J., C. P. 292.
(*q*) Evans *v.* Walton, L. R., 2 C. P. 815.
(*r*) Grinnell *v.* Wells, 7 M. & Gr. 1041; 8 Sc. N. R. 741.

gives no remedy to the parent for the mere seduction of his daughter, however wrongfully it may have been accomplished. Incontinence on the part of a young woman cannot be made the foundation of an action against the person who has tempted her and deprived her of her chastity(*s*); but if she is living with her parent at the time of the seduction, and the seduction is followed by pregnancy and illness, whereby the parent is deprived of the filial services theretofore rendered to him, an action is maintainable against the seducer.

The foundation, therefore, of the action by a father to recover damages against a wrong-doer for the seduction of his daughter has been uniformly placed, from the earliest time, not upon the seduction itself, which is the wrongful act of the defendant, but upon the loss of the service of the daughter, in which service he is supposed to have a legal right or interest. It has, consequently, always been held, that the loss of service must be alleged in the declaration of the cause of action, and be proved at the trial, or the plaintiff must fail. It is not enough for the father to show that his daughter was a poor person maintaining herself by her labor, that the defendant seduced her and got her with child, and that she became unable to maintain herself, and that the father was forced to maintain her at his own expense, and to pay for doctors and nurses to attend upon her, etc.(*t*); or that the father had apprenticed her to the defendant, and paid him a large sum of money to instruct her in a trade, but that the defendant seduced her and got her with child, and rendered her unable to learn the trade(*u*). However slight the act of service may be, it must be a real genuine service, such as the parent may command. The making tea, or doing any household work at the command of the parent is, however, quite sufficient to constitute the relationship of master and servant when the girl is residing with her father and mother(*x*).

1275 *Effect of the absence of the daughter from the parent's roof at the time of the seduction.*—As the loss of service is the foundation of the action, it follows that the relation of master and servant must subsist between the plaintiff and the person seduced at the time of the seduction, for otherwise the defendant's act does not infringe upon the plaintiff's rights, or deprive him of anything then belonging to him. If, there-

(*s*) Saterthwaite *v.* Duerst, 4 Doug. 315; 5 East, 47, n. White *v.* Nellis, 31 N. Y. 405. Lee *v.* Hodges, 13 Gratt. (Va.) 726. Roberts *v.* Connelly, 14 Ala. 235.

(*t*) Grinnell *v.* Wells, 14 Law J., C. P. 19. George *v.* Van Horn, 9 Barb. 523. Bartley *v.* Richtmeyer, 4 N. Y. 38, 45. Logan *v.* Murray, 6 Serg. & Rawle, 175. South *v.* Denniston, 2 Watts, 474. Miller *v.* Thompson, 1 Wend. 447.

(*u*) Harris *v.* Butler, 2 M. & W. 539.

(*x*) Thompson *v.* Ross, 5 H. & N. 16; 29 Law J., Exch. 1. Evans *v.* Walton, *supra*.

fore, the daughter, at the time she was seduced, was at the head of an establishment of her own, and her father was living with her as a visitor in her own house, she cannot be treated as being in the subordinate position of a servant, and the father cannot maintain an action for loss of service(*y*). If the daughter, at the time she was seduced, did not reside with the father, but was living away from home in the service of another person, the father has no ground of action for the seduction(*z*) unless the person with whom she is living inveigled her away from home into a pretended service, for the purpose of seducing her, although it be alleged in the declaration, and proved at the trial, that the absence was only temporary, and that she intended to return and live with her father after the term of service had expired(*a*). But if she is away only on a temporary visit, and still forms part of her father's family, and makes herself serviceable to him when she is at home, such temporary absence constitutes no impediment to an action by the father for damages(*b*). And if she is seduced while on her way home from her master's to her father's house, having been dismissed by her master, that is sufficient constructive service(*c*). Whenever the girl is away in actual service, the mere fact of her mistress being in the habit, from time to time, of allowing her to go home and assist her widowed mother in needlework, has been held to be insufficient to enable the mother to maintain an action for damages(*d*), although the seduction

(*y*) Manley *v.* Field, 7 C. B., N. S. 96; 29 Law J., C. P. 79. But see Villepigue *v.* Shular, 3 Strobh. 462.

(*z*) Dean *v.* Peel, 5 East, 47. Grinnell *v.* Wells, 7 M. & Gr. 1042; 8 Sc. N. R. 741. The English rule has been somewhat modified in many of the States, and a right of action given where under the English decisions no action would lie.

It is well settled that a father cannot maintain an action for the seduction of a daughter over twenty-one years of age, who was not a member of his family at the time of the seduction, and who owed him no services. Patterson *v.* Thompson, 24 Ark. 55. McDaniel *v.* Edwards, 7 Ired. 408. Lee *v.* Hodges, 13 Gratt. (Va.) 726.

But where the daughter seduced is a minor and has left her father's house for the service of a third person, the father may maintain an action for her seduction while thus absent, if the circumstances were such that he might have commanded her services at pleasure. Bartley *v.* Richtmeyer, 4 N. Y. 38, 44. White *v.* Nellis, 31 N. Y. 405. Martin *v.* Payne, 9 Johns. 387. Clark *v.* Fitch, 2 Wend. 459. Ingersoll *v.* Jones, 5 Barb. 661. Hornketh *v.* Barr, 8 Serg. & Rawle, 36. Bolton *v.* Miller, 6 Ind. 292. Mulvehall *v.* Millward, 11 N. Y. 343. Boyd *v.* Byrd, 8 Blackf. 113. Greenwood *v.* Greenwood, 28 Md. 369. Gray *v.* Durland, 51 N. Y. 424, 428. The fact that the father had given his daughter her time absolutely and relinquished all claim to her wages and sevices, does not affect this rule. Id.

But a father cannot maintain an action for the seduction of a minor daughter who was at the time of the seduction bound out as a servant to her seducer, unless the latter induced the daughter to enter into his service with a view to her seduction. Dain *v.* Wycoff, 7 N. Y. 191; *S. C.*, 18 N. Y. 45.

(*a*) Blaymire *v.* Haley, 6 M. & W. 55. Harris *v.* Butler, 2 Ib. 539.

(*b*) Griffiths *v.* Teetgen, 15 C. B. 344. Davidson *v.* Goodall, 18 N. H. 423. Lipe *v.* Eisenlerd, 32 N. Y. 229.

(*c*) Terry *v.* Hutchinson, L. R., 3 Q. B. 599.

(*d*) Thompson *v.* Ross, 29 Law J., Exch. 1.

actually is effected while she is on such a temporary visit, and during such visit she assists in the housework(*e*). If the relation of master and servant is contracted after the seduction, the loss of service cannot then be made the foundation of an action. The state of the case then is, that the master has taken into his service a servant whose services are less valuable to him by reason of antecedent occurrences, and there is no consequential injury of which he has any right to complain as against the seducer(*f*).

1276 *Pretended hiring of girls for purposes of seduction.*—If a person hires a girl as a servant, and withdraws her from her father's service for the very purpose of getting possession of her person and seducing her, this fraudulently-concocted service does not put an end to the relation of master and servant previously subsisting between the daughter and her father, and does not throw any impediment in the way of an action by the latter for the seduction. Thus, where the plaintiff's daughter, who was residing with the plaintiff, and rendering him service in domestic matters, advertised for a situation as lady's maid, and the defendant, seeing the advertisement, proposed to engage her in that capacity for his sister, but afterwards hired her at weekly wages to take care of an empty house, where he seduced her and got her with child, it was held by Abbott, C.J., to be a question for the jury whether the daughter was withdrawn from her father's house by the defendant under a *bona fide* contract for her services, or the whole matter was a mere pretence and contrivance on the part of the defendant to get possession of her person. "If she was the servant of the defendant," observes his lordship, "the action certainly cannot be maintained; but had she ceased to be the servant of her father, the plaintiff? If the jury be of opinion that the defendant practised a fraud and contrivance to procure her to leave her father's house, without any real intention to hire her as a servant, I am of opinion that the action is maintainable." And afterwards, in summing up to the jury, his lordship said, "During the time that she was in her father's house she was his servant; was there an end put to that service? It is alleged by the defendant that there was, because he himself hired her for the purpose of keeping his own house at the rate of 7*s*. per week: but if he

(*e*) Hedges *v.* Tagg, L. R., 7 Exch. 283. To the contrary, see Gray *v.* Durland, 51 N. Y. 424. In the latter case the minor daughter of a widow was out at service, but while temporarily at home to aid her mother during sickness was seduced, and then returned to her own employment; the court held that the daughter was in the actual service of the mother at the time in such sense that the latter could maintain an action to recover damages for loss of services.

(*f*) Davies *v.* Williams, 10 Q. B. 728; 16 Law J., Q. B. 369. Bartley *v.* Richtmyer, 4 N. Y. 38.

did not in reality hire her with that intention, but with the wicked view of seducing her, then I am of opinion that the relation of master and servant was never contracted between them "(*g*).

1277 *Seduction of married daughters.*—Where a married woman separated from her husband, returned to her father's house and lived with him, performing various acts of service, it was contended that a married woman was not capable of making any contract of service; but the court held that, as against a wrong-doer, it was sufficient to prove that the relationship of master and servant *de facto* existed at the time of the seduction, and that, in the absence of any interference on the part of the husband, it was not competent to the defendant to set up the husband's right to the services of his wife as an answer to the action(*h*).

1278 *Effect of proof that the defendant, though he seduced the girl, was not the father of the child of which she was delivered.*—If the defendant, though he seduced the girl, was not the father of the child of which she was subsequenty delivered, and did not consequently cause the pregnacy and illness, and the consequent loss of service, there is no cause of action against him(*i*).

1279 *Effect of the seduction and loss of service having been occasioned by the plaintiff's own misconduct and neglect of his parental duties.*—It is expected of every parent that he should be jealous of, and watchful over, the honor of his daughter, and protect her, as far as possible, from the advances and solicitations of notorious libertines. If, therefore, he introduces her to profligate acquaintances, encourages improper intimacies, and invites the injury of which he complains, he has no ground of action for damages. Where the defendant proposed to marry the daughter of the plaintiff, and was received and entertained as her suitor at the plaintiff's house, and the plaintiff then ascertained that the defendant was a married man and a great libertine, notwithstanding which he allowed him to continue his addresses to the daughter, on the strength of certain assurances which he gave to the effect that his wife was afflicted with a mortal disease, and could not live long, and then he would marry the daughter, and the defendant ultimately seduced her, it was held, that, as the plaintiff had by his own

(*g*) Speight *v.* Oliviera, 2 Stark. 495. See Dain *v.* Wyckoff, 18 N. Y. 45.
(*h*) Harper *v.* Luffkin, 7 B. & C. 387.
(*i*) Eager *v.* Grimwood, 1 Exch. 61; 16 Law J., Exch. 286. But the fact that neither pregnancy nor sexual disease has resulted from a seduction, does not defeat the right of action, if the proximate effect was any incapacity to labor. Abrahams *v.* Kidney, 104 Mass. 222. Vanhorn *v.* Freeman, 1 Halst. 322.

misconduct contributed to the injury of which he complained, he had no ground of action for redress(*j*).

1280 *Of the parties entitled to maintain an action for seduction*(*k*).—To entitle a person to maintain an action for the seduction of a girl, it must be proved, as we have seen, that the relationship of master and servant existed between the plaintiff and the person seduced at the time of the seduction. The action may be brought by any person with whom the seduced girl was residing at the time she was seduced, either in the character of a daughter and servant, or as a ward and servant, or as a servant only. Thus, in the case of an orphan living with a relation, or a friend or benefactor, and rendering such domestic attendance and obedience as is usually rendered by a daughter to her father, the relation or benefactor is the proper person to sue for the wrong done(*l*); and standing *loco parentis*, and being thus entitled to sue, he is permitted to recover damages beyond the mere loss of service, as when the action is brought by the actual parent(*m*).

1281 *Of the pleadings in actions for seduction.*—If a declaration by a parent for the seduction of his daughter contains no allegation of the loss of the service of the daughter, it is bad in arrest of judgment. "The loss of service must be alleged in the declaration, and must be proved

(*j*) Beddie *v.* Scoolt, 1 Peake, 316. But the fact that the plaintiff allowed a married man to visit his daughter as a suitor, and placed her in exposed situations, will not be a bar to an action for the seduction of the daughter by such suitor, unless he knew him to be married; but it is a circumstance for the jury to consider. Richardson *v.* Fonts, 11 Ind. 466. Proof that the defendant bundled with the daughter on the night of the seduction, with the knowledge and without objection on the part of the parent, will defeat a recovery. Hollis *v.* Wells, 3 Pa. Law. Jour. R. 169.

And any misconduct by way of connivance on the part of the father, which has coöperated with the misconduct of the defendant to produce the wrong, will defeat a recovery. Vossel *v.* Cole, 10 Mo. 634. Travis *v.* Barger, 24 Barb. 614.

(*k*) See 30 & 31 Vict. c. 142, s. 10, *ante*, p. 675; 56 N. Y. 435.

(*l*) Holt, 453, note. The action may be maintained by a married woman who has been abandoned by her husband. Badgley *v.* Decker, 44 Barb. 577.

By a cousin of the seduced who has furnished her a home, the nearer relatives being unable to do so. Davidson *v.* Goodall, 18 N. H. 423.

By a widowed mother, when the daughter seduced was actually in her service. Gray *v.* Durland, 51 N. Y. 424.

By a step-father who has adopted an illegitimate daughter of his wife. Bracy *v.* Kibbe, 31 Barb. 273. Maguinay *v.* Sandek, 5 Sneed (Tenn.), 146. But see Bartley *v.* Richtmyer, 4 N. Y. 38.

By a guardian. Fensler *v.* Meyer, 3 Watts & Serg. 416. Ball *v.* Bruce, 21 Ill. 161. By a master. Id. By one who has adopted the daughter of a deceased friend. Ingersoll *v.* Jones, 5 Barb. 661.

Or any other person standing *in loco parentis* to the person seduced, provided such person might have commanded her services at pleasure. Bartley *v.* Richtmyer, 4 N. Y. 38. Kelley *v.* Donnelly, 5 Md. 211. Ball *v.* Bruce, 21 Ill. 161.

But the action cannot be maintained in the name of the female seduced. Hamilton *v.* Lomax, 26 Barb. 615.

(*m*) Irwin *v.* Dearman, 11 East, 24. Edmonson *v.* Machell, 2 T. R. 4. Lipe *v.* Eisenlerd, 32 N. Y. 229. But a mere master, having no capacity to be injured beyond the pecuniary worth of the services lost, should be limited, in his recovery, to the value of those services. Id.

at the trial, or the plaintiff must fail"(*n*). The defendant either pleads "Not guilty," or that he did what is complained of by the plaintiff's leave, and the plaintiff replies, taking issue upon the plea(*o*). The plea of not guilty puts in issue both the fact of the seduction and the fact that the person seduced was the servant of the plaintiff(*p*). Under this plea the defendant may show that the seduced girl was in the service of a third person, and was not at the time of the seduction residing with the plaintiff; also that he, though he had carnal knowledge of the seduced woman, was not the father of the child of which she was delivered, and, consequently, that the confinement and illness, and loss of service and expense, were not occasioned by the act of the defendant(*q*); also that the illness and consequent loss of service were not occasioned by the act of seduction, but by the defendant's leaving and abandoning the girl after he had seduced her(*r*); also that the seduced woman entered the service of her master in a state of pregnancy(*s*), or that the plaintiff was a party to his own dishonor, and by his own imprudence and misconduct has contributed to the injury of which he complains(*t*).

1282 *Evidence at the trial in actions for seduction—Proof of the relationship of master and servant.*—As the loss of service is the foundation of the action for seduction, it is necessary to establish the relationship of master and servant between the plaintiff and the seduced girl, as well as to prove the fact of the seduction itself, in order to make out a case for damages. The relationship of master and servant must be shown to have subsisted at the time of the seduction, for, if it appears that the relationship was contracted afterwards, there is no injury to the plaintiff, and no ground of action to him(*u*). It would seem also that no action is maintainable by the parent, if, at the time of the daughter's confinement, she is in the service of another(*v*). Very slight evidence of actual service, such as milking cows, making tea, nursing children, will suffice to prove the fact of actual service(*x*). And where a daughter

(*n*) Tindal, C.J., Grinnell *v.* Wells, 7 M. & Gr. 1040. Lee *v.* Hodges, 13 Gratt. (Va.) 726.

(*o*) 15 & 16 Vict. c. 76, Sched. B, 38, 39.

(*p*) Holloway *v.* Abel, 7 C. & P. 528. Torrence *v.* Gibbins, 5 Q. B. 297.

(*q*) Eager *v.* Grimwood, 1 Exch. 61; 16 Law J., Exch. 236.

(*r*) Boyle *v.* Brandon, 13 M. & W. 738; 14 Law J., Exch. 344. See Abrahams *v.* Kidney, 104 Mass. 220; Knight *v.* Wilcox, 14 N. Y. 413.

(*s*) Davies *v.* Williams, 10 Q. B. 728. See Bradley *v.* Richtmyer, 4 N. Y. 38.

(*t*) Reddie *v.* Scoolt, 1 Peake, 316. See Hollis *v.* Wells, 3 Pa. Law Jour. R. 169; Vossel *v.* Cole, 10 Mo. 634; Travis *v.* Barger, 24 Barb. 614.

(*u*) Davies *v.* Williams, 10 Q. B. 729. Bradley *v.* Richtmyer, 4 N. Y. 38.

(*v*) Hedges *v.* Tagg, *supra*.

(*x*) Buller, J., Bennett *v.* Allcott, 2 T. R. 168; *ante*, p. 1090. Sutton *v.* Huffman, 3 Vroom (N. J.), 58. Doyle *v.* Jessup, 29 Ill. 460. Knight *v.* Wilcox, 14 N. Y. 413. Briggs *v.* Evans, 5 Ired. 16. Moran *v.* Dawes, 4 Cow. 412. Ball *v.* Bruce, 21 Ill. 161.

is shown to have been living with her father at the time of the seduction, forming part of his family, and liable to his control and command, service will be presumed, and proof of acts of actual service will be unnecessary(*y*). It is not necessary to produce the seduced daughter as a witness at the trial, if the seduction can be proved aliunde, though the withholding of her testimony may afford a strong topic of observation to the jury(*z*).

1283 *Of the damages recoverable in actions for seduction.*—In estimating the damages to be given to a father for the loss of service of his daughter from seduction, the jury are not confined to the consideration of the mere loss of service, but may give damages for the distress of mind which the parent has sustained in being deprived of the society and comfort of his child, and by the dishonor which he receives(*a*). The jury also must take into consideration the situation in life and circumstances of the parties, and say what they think, under all the circumstances, is a reasonable compensation to be given to the parent(*b*). "In point of form," observes Lord Eldon "the action only purports to give a recompense for loss of service; but we cannot shut our eyes to the fact, that it is an action brought by a parent for an injury to her child, and the jury may take into their consideration all that she can feel from the nature of the loss. They may look upon her as a parent losing the comfort as well as the service of her daughter, in whose virtue she can feel no consolation; and as the parent of other children whose morals may be corrupted by her example(*c*).

1284 *Evidence in aggravation of damages—Proof that the defendant made his advances to the daughter under the guise of matrimony.*—Evidence is inadmissible to show that the defendant accomplished the seduction through the medium of a promise of marriage, for the purpose of enhancing the damages, as the breach of promise constitutes a distinct cause of action, in respect of which damages are recoverable by the daughter. "But you may ask," observes Lord Ellenborough, "whether the defendant paid his addresses to her in an honorable way"(*d*).

(*y*) Maunder *v.* Venn, M. & M. 323. Jones *v.* Brown, 1 Esp. 217. Fores *v.* Wilson, 1 Peake, 77. Coleridge, J., Torrence *v.* Gibbins, 5 Q. B. 300. Hewitt *v.* Prime, 21 Wend. 79. Anderson *v.* Ryan, 3 Gilman, 583.

(*z*) Farmer *v.* Joseph, Holt, 452.

(*a*) Irwin *v.* Dearman, 11 East, 23. Fox *v.* Stevens, 13 Minn. 272. Lipe *v.* Eisenlerd, 32 N. Y. 229. Pruitt *v.* Cox, 21 Ind. 15. Phealing *v.* Kenderdine, 20 Penn. St. 354. Ellington *v.* Ellington, 47 Miss. 329. Damon *v.* Moore, 5 Lans. (N. Y.) 454.

(*b*) Andrews *v.* Askey, 8 C. & P. 9. Southernwood *v.* Ramsden, cited ib. 9. Rea *v.* Tucker, 51 Ill. 110.

(*c*) Bedford *v.* M'Kowl, 3 Esp. 120. See per Lord Ellenborough, C.J., in Irwin *v.* Dearman, *supra*.

(*d*) Dodd *v.* Norris, 3 Campb. 520. Elliott *v.* Nicklin, 5 Pr. 641. Brownell *v.* McEwen, 5

"The jury do right," observes Wilmot, C.J., "in a case where it was proved that the seducer had made his advances under the guise of matrimony, in giving liberal damages; and if the party seduced brings another action against the defendant for the breach of promise of marriage, so much the better. If much greater damages had been given, we should not have been dissatisfied therewith, the plaintiff having received this insult in his own house, where he had civilly received the defendant, and permitted him to pay his addresses to his daughter"(*e*).

If, in the course of the trial, a promise of marriage is inadvertently proved, the jury must be told to exclude the injury resulting to the seduced girl from the breach of promise of marriage from their consideration, and leave it quite out of the question in determining the amount of the damages to be recovered by the father and master for the loss of service(*f*).

1285 *Evidence in mitigation of damages.*—The loss that the father sustains by the seduction of his daughter depends, to a very great extent, upon the value of her previous character. *Prima facie*, it is to be presumed that she was a moral and virtuous girl at the time of her seduction, and contributed to the domestic happiness of her parents, but it is competent to the defendant to show that this was not the case, in order to diminish the loss and reduce the damages; and if evidence is given to impeach the character of the girl, it may be met and rebutted by evidence on the part of the plaintiff of her previous good character. The defendant may call witnesses to prove particular acts of sexual intercourse between the plaintiff's daughter and those witnesses prior to the period of the seduction, either for the purpose of reducing the damages(*g*), or for the purpose of showing that the defendant is not the father of the child, and, therefore, that his sexual intercourse with the daughter did not occasion the loss of service of which the plaintiff complains(*h*). It may be shown that the seduced girl, prior to the seduction, was in the habit of keeping loose company, or of giving utter-

Den. 367. Whitney *v.* Elmer, 60 Barb. 250. Phealing *v.* Kenderdine, 20 Penn. (8 Harris) 354. Foster *v.* Scoffield, 1 Johns. 297. Travis *v.* Barger, 24 Barb. 614. See Odell *v.* Stephens, 12 Ind. 384; Lee *v.* Hefley, 21 Ind. 98.

That evidence that the defendant succeeded in seducing the girl under and by means of a promise of marriage, may be given for the purpose of increasing damages, see White *v.* Campbell, 13 Gratt. (Va.) 573.

(*e*) Tullidge *v.* Wade, 3 Wils. 18.

(*f*) Ibid. But see Grover *v.* Dill, 3 Clarke (Iowa), 337.

(*g*) Verry *v.* Watkins, 7 C. & P. 308. Smith *v.* Milburn, 17 Iowa, 30. But see Lea *v.* Henderson, 1 Cold. (Tenn.) 146.

(*h*) Eager *v.* Grimwood, 1 Exch. 61; 16 Law J., Exch. 236.

ance to loose language and immodest remarks; she may be asked, for instance, whether she had not admitted that some person other than the defendant was the father of her child; but before witnesses can be called to prove the nature of the language or of the remarks, she must be pointedly and expressly asked in her cross-examination, whether she ever used the particular language or the precise remarks intended to be given in evidence against her(*i*).

Where the whole of the cross-examination in an action for seduction went to show that the person seduced had conducted herself immodestly and kept improper company, witnesses were allowed to be called to prove her general good character and modest deportment, and the general respectability of the family(*k*). But where the daughter was cross-examined to show that she had submitted herself to the defendant's embraces under circumstances of extreme indelicacy, and had been guilty of great levity of conduct, Lord Ellenborough refused to allow witnesses to be called to the general character of the daughter, saying she had ample opportunity of setting her conduct right in the course of her re-examination(*l*). And where evidence was given on the part of the defendant to prove that the girl, previous to her acquaintance with him, had had a child by another man, Lord Ellenborough restricted the evidence tendered by the plaintiff in reply thereto to disproving the specific breach of chastity alleged by the defendant, and would not allow him to give general evidence of his daughter's good character for chastity and respectability(*m*).

1286 *Damages recoverable in actions for inducing or persuading wives, servants, or workmen to abandon their duties or neglect the fulfilment of a contract.*—If a servant or contractor is induced not to perform the work or contract which he has undertaken to perform through the malicious persuasion of the defendant, damages far beyond the value of the subject-matter of the contract may be recoverable from the wrongdoer(*n*). The measure of damages is not to be confined to the loss of the services of the servants who were actually enticed away, but the

(*i*) Carpenter *v.* Wall, 11 Ad. & E. 803. See State *v.* Sutherland, 30 Iowa, 570.

In an action for seduction, the seduced cannot be asked on cross-examination whether she had connection with other men, either for the purpose of showing her bad character, or for the purpose of contradicting her if she deny it. Hoffman *v.* Kemerer, 44 Penn. St. 452. Shattuck *v.* Myers, 13 Ind. 46. Doyle *v.* Jessup, 29 Ill. 460. Reed *v.* Williams, 5 Sneed (Tenn.), 580.

(*k*) Bate *v.* Hill, 1 C. & P. 100. State *v.* Shean, 32 Iowa, 88. See McAulay *v.* Birkhead, 13 Ired. 28.

(*l*) Dodd *v.* Norris, 3 Campb. 518.

(*m*) Bamfield *v.* Massey, 1 Campb. 460.

(*n*) Crompton, J., Lumley *v.* Gye, 2 El. & Bl. 230; 22 Law J., Q. B. 463.

jury are justified in giving ample compensation for all the damage resulting from the wrongful act(*o*). Where the plaintiff alleged that his wife left him and lived apart from him, during which time a considerable fortune was left to her separate use, and that, she being willing to return to the plaintiff, the defendant unlawfully persuaded her to continue to live away from the plaintiff, whereby he lost the assistance of his wife in his domestic affairs and the advantage of her fortune, 3000*l.* damages were recovered for the wrong done(*p*).

1287 *Indictment for the abduction of unmarried girls.*—Whoever unlawfully takes, or causes to be taken, any unmarried girl, being under the age of sixteen years, out of the possession, and against the will, of her father or mother, or of any other person having the lawful care or charge of her, may be indicted and convicted of a misdemeanor(*q*). And whoever fraudulently allures, takes away, or detains any woman under the age of twenty-one years, who has any interest in any real or personal estate, or is presumptive heiress, or co-heiress, or next of kin, etc., to any one having such interest, out of the possession, and against the will, of her father or mother, or other person having the lawful care or charge of her, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person, may be indicted for felony; and, if convicted, he is incapable of taking any estate or interest in any property of the woman, or in which she shall have any interest, or which may come to her as heiress, co-heiress, or next of kin, etc.(*r*). The taking and detaining, from motives of lucre, of any woman over twenty-one, who is entitled to any real or personal estate, etc., against her will, with intent to marry or carnally know her, subjects the wrong-doer to a similar punishment and disability(*s*).

(*o*) Guntor *v.* Astor, 4 Moor, 15. Dubois *v.* Allen, Anthon, 94.
(*p*) Winsmore *v.* Greenbank, Willes, 580.
(*q*) 24 & 25 Vict. c. 100, s. 55. Reg. *v.* Timmins, 30 Law J., M. C. 45. Reg. *v.* Manktelow, 22 ib. 115.
(*r*) 24 & 25 Vict. c. 100, s. 58.
(*s*) Ibid.

CHAPTER XX.

OF ACTIONS EX DELICTO—PARTIES THERETO—NON-JOINDER AND MIS-JOINDER OF PARTIES.

SECTION I.—*Parties to be made plaintiffs in actions ex delicto.*—Parties to be made plaintiffs in actions of tort founded on contract—Remedies of tenants in common and joint tenants against each other—Rights of the survivor—Trustee and cestui que trust—Bailees of goods—Master and servant—Husband and wife—Actions by married women after a judicial separation, or an order for protection—Actions by infants, heirs-at-law, devisees, and personal representatives—Actions by administrators and trustees of bankrupts—Number of the plaintiffs—Joint and separate rights of action.

SECTION II.—*Parties to be made defendants in actions ex delicto.*—Tenants in common, corporate bodies, public boards, joint-stock companies, trustees and commissioners, public officers, master and servant, principal and agent—Subsequent ratification and adoption of a wrongful act—Servants and agents—Husband and wife—Infants—Executors or administrators—Trustees in bankruptcy—Liability of a bankrupt after his bankruptcy—Number of the defendants.

SECTION III.—*Of the non-joinder and mis-joinder of parties.*—Amendment before and at the trial—Misjoinder of defendants in actions of tort founded on contract—Plea in abatement for non-joinder—Amendment.

SECTION I.

OF ACTIONS EX DELICTO AND THE PARTIES TO BE MADE PLAINTIFFS IN SUCH ACTIONS(a).

1288 *Parties to be made plaintiffs in actions of tort founded on contract.*—Where a contract creates a duty, the neglect to perform that duty, as well as the negligent performance of it, is a ground of action for a tort. Both the non-feazance and the mis-feazance constitute a wrong-

(a) Parties to be made plaintiffs in particular actions have already been considered under their appropriate heads. See Index *in voce*.

ful act, for which the remedy is by action of contract or of tort, at the option of the party injured(*b*). Whenever the goods and chattels or materials of an employer are placed in the hands of a workman to be worked upon, any loss or injury to the chattels and materials, from the negligent execution of the work, forms a ground of action upon a tort as well as upon a contract. So if I deliver goods to a carrier to be carried for hire, and the goods are lost or injured through the negligent performance of the work of carrying, an action of contract or of tort is maintainable against the carrier, at the option of the owner of the goods(*c*).

But it is said to be a rule of law that, whenever a wrong is founded upon a breach of contract, the plaintiff who sues in respect thereof must be either a party or a privy to the contract, in order to establish a duty on the part of the defendant towards the plaintiff, and show a wrong done to the latter(*d*). Thus, where the defendant had contracted with the Postmaster-General to supply a certain number of stage-coaches, and keep them in good working order and condition, and fit for the road, and, through his neglect to do the necessary repairs, one of the coaches broke down and injured the coachman, it was held that the coachman could not maintain an action against the coachmaker, as the negligence and breach of duty on the part of the coachmaker were grounded purely upon a breach of contract, and the coachman was neither a party nor privy to that contract(*e*). So where a person sent his luggage with his servant by a railway, and himself went by a later train, and the railway company received the luggage as the servant's, it was held that the master could not sue for its loss(*f*). But every person who exercises an employment is bound, as we have seen, to take especial care to do his work so as not to injure another by the negligent performance of that work, whether what he does is done merely to please himself, or by virtue of a contract made with another (*ante*, pp. 506–510). If materials furnished to a workman to be manufactured or worked upon are injured by the negligent execution of the work, the owner of the materials, or the person who furnished them to the workman, is the person to be made plaintiff in an action for the neglect of duty; but if the person or the property of

(*b*) Boorman *v.* Brown, 3 Q. B. 526; 11 Cl. & Fin. 1.
(*c*) Coggs *v.* Bernard, Smith's L. C., 6th ed., 177.
(*d*) Tollit *v.* Sherstone, 5 M. & W. 288. Clancy *v.* Byrne, 56 N. Y. 129.
(*e*) Winterbottom *v.* Wright, 10 M. & W. 115. Blakemore *v.* Brist. and Exeter Rail. Co., 8 Ell. & Bl. 1049; 27 Law J., Q. B. 167; *ante*, pp. 18, 19. Coughtry *v.* The Globe Woolen Co., 56 N. Y. 124.
(*f*) Becher *v.* Gt. East. Rwy., L. R., 5 Q. B. 241.

a stranger is injured by the negligent execution of the work, the injured stranger is the person to be made plaintiff (*ante*, pp. 506–510).

Every person who enters upon the performance of the work of carrying merchandise or passengers is bound to exercise due and proper care and skill in the performance of the work, whether the work is done under a contract or gratuitously(*g*), and every person who has been injured by the negligent performance of the work of carrying, is entitled, as we have seen, to an action against the carrier, although he is no party to the contract under which the work was done(*h*).

There are other cases, also, in which a third person, though not a party to a contract, may sue for the damage sustained if it be broken. As, for example, if an apothecary administers improper medicines to his patient, or a surgeon unskilfully treats him, and thereby injures his health, the apothecary and the surgeon will be liable to the patient, although the father or friend of the patient may have been the contracting party with the apothecary or surgeon: for, though no such contract had been made, the apothecary, if he gave improper medicines, or the surgeon, if he took him as a patient and unskilfully treated him, would be liable to an action for a misfeasance(*i*).

If a mason contract to erect a bridge or other work in a public road, which he constructs, but not according to the contract, and the defects of which are a nuisance to the highway, he may be responsible for it to a third person who is injured by the defective construction, and he cannot be saved from the consequences of his illegal act in committing the nuisance on the highway, by showing that he was also guilty of a breach of contract, and responsible for it. And it may be the same when any one delivers to another, without notice, an instrument in its nature dangerous, as a loaded gun, which he himself has loaded, and that other person to whom it is delivered is injured thereby; or if he negligently places it in an improper situation, easily accessible to a third person, who sustains damage from it, not supposing that a loaded gun would have been placed in such a spot(*j*).

Whenever an action of tort is founded upon a contract, it proceeds upon the assumption that the contract is good in law, and can be en-

(*g*) See Austin *v.* Gt. West. Rail. Co., L. R., 2 Q. B. 442.

(*h*) Collett *v.* Lond. and North-West Rail. Co. Marshall *v.* York, etc., *ante*, pp. 620.

(*i*) Parke, B., Longmeid *v.* Holliday, 6 Exch. 767. Gladwell *v.* Steggall, 8 Sc. 67; 5 B. N. C. 733. Norton *v.* Sewall, 106 Mass. 143. Thomas *v.* Winchester, 6 N. Y. 397. See Davidson *v.* Nichols, 11 Allen, 514, 519; McDonald *v.* Snelling, 14 Allen, 290, 295; Wellington *v.* Downer Kerosene Oil Co., 104 Mass. 64.

(*j*) Parke, B., Longmeid *v.* Holliday, 6 Exch. 767. Dixon *v.* Bell, 5 M. & S. 198. See Loop *v.* Litchfield, 42 N. Y. 351.

forced by action; if, therefore, the contract is verbal when by law it is required to be in writing, no duty is created by it, and an action founded upon such contract is not maintainable(*k*).

1289 *Of the remedies which tenants in common and joint tenants have against each other.*—If two several owners of houses have a river or stream in common, and one of them corrupts it, the other shall have an action against him for damages. And whenever one tenant in common misuses the common property, or commits waste, he is responsible to his co-tenant in common for the injury he has done. If there be two tenants in common of a wood, and one of them leases his part to the other, who cuts down young timber trees and does waste, he shall be punished for a moiety of the waste, and the lessor shall recover a moiety of the place wasted: but one tenant in common cannot maintain an action in the nature of waste against the other, for cutting down trees of a proper age and proper growth, for this is no injury to the inheritance; but he is entitled, in an action of account, to recover a moiety of the value of the tree(*l*).

By the common law, indeed, joint tenants and tenants in common had no remedy against each other where one alone received the whole profits of the estate; for he could not be charged as bailiff or receiver to his companion, unless he actually made him so; but by 4 Anne, c. 16, s. 27, it is provided, that joint tenants and tenants in common, and their executors and administrators, may have an account against the others as bailiffs, for receiving more than their just share or proportion(*m*).

1290 *Rights of the survivor of two joint tenants or tenants in common.*—In case of the death of one of two joint tenants of lands or chattels, the whole interest in the property passes, as we have seen, to the survivor; but in the case of the death of one of two tenants in common of real property, the share and interest of the deceased passes to his heir-at-law, and in the case of a tenancy in common of chattels to the personal representatives of the deceased. But in the case of the death of one of two tenants in common of a patent, the right of action for an infringement of the patent in the lifetime of the deceased tenant in common survives to the other, and the latter is consequently entitled to recover the whole of the damages(*n*).

(*k*) Carrington *v.* Roots, 2 M. & W. 255. Dung *v.* Parker, 52 N. Y. 494. Levy *v.* Brush, 45 N. Y. 589.

(*l*) Martyn *v.* Knowllys, 8 T. R. 145; *ante*, pp. 290, 353.

(*m*) See Jacobs *v.* Seward, L. R., 5 Eng. & Ir. App. 464.

(*n*) Smith *v.* Lond. & North-West Rail. Co., 2 Ell. & Bl. 69

1291 *Trustee and cestui que trust.*—In the case of a permanent injury to real property in the occupation of a tenant to whom it has been demised by a *cestui que* trust, the trustee in whom the legal estate in reversion is vested is the proper person to sue for the injury to the reversion, and not the *cestui que* trust, who has only an equitable interest. "The *cestui que* trust," observes Tindal, C.J., "has no interest in law; if he enters, his possession is considered the possession of the trustee, and any disposition made by him and adopted by the trustee is considered the disposition of the trustee"(*o*).

1292 *Bailees of goods.*—We have seen that many persons who have only a special property in goods may maintain an action for damages done to them, or for the conversion, detention, or loss of them (*ante*, pp. 443–446, 553); such as a carrier, who is the mere instrument of conveyance, or a workman, to whom goods have been sent to be repaired or worked upon, or a warehouse-keeper, who has them for safe custody, or an auctioneer or shopkeeper, to whom they have been sent to sell(*p*), or the master of a vessel, or of a canal boat, who is intrusted with the possession and management of the vessel or boat, and its tackle and furniture(*q*), and many others, to whom goods have been delivered for a special purpose, and who do not pretend to any absolute property in them(*r*).

1293 *Master and servant.*—The master is entitled, as we have seen, to maintain an action for damages for a personal injury to his servant, whereby he has been deprived of the services of the latter, and for expenses incurred by him in curing his servant's personal injuries, and recovering the benefit of his services. "Courts of justice have allowed all the circumstances of the case to be taken into consideration, with a view to the calculation of the damages"(*s*). The master may claim, and will be entitled to recover, damages not only for the loss of the services of his servant up to the time of the commencement of the action, but, if the servant continues disabled, down to the time when it appears by the evidence that the disability may be expected to cease(*t*). A parent whose child was, before the injury it sustained, capable of performing acts of service, may, as we have seen, maintain an action for damages for the loss of the services of the child, if he can

(*o*) Vallance *v.* Savage, 7 Bing. 569.
(*p*) Williams *v.* Millington, 1 H. Bl. 84. Colwell *v.* Reeves, 2 Campb. 576.
(*q*) Pitts *v.* Gaince, 1 Salk. 10. Moore *v.* Robinson, 2 B. & Add. 817.
(*r*) Martini *v.* Coles, 1 M. & S. 147.
(*s*) Abbott, C.J., Hall *v.* Hollander, 4 B. & C. 663; *ante*, p. 1095.
(*t*) Hodsoll *v.* Stallebrass, 11 Ad. & E. 301; *post*, ch. 22. PROSPECTIVE DAMAGES.

prove that the child was living with him, and rendered him some sort of personal service(*u*). The servant himself, also, is entitled to an action for the damage he has sustained by the tortious act: for loss of wages, bodily pain, and the expenses he has incurred in procuring medical advice and medicine, food and lodging, which would otherwise have been provided for him by his master. The servant himself who sustains bodily pain and anguish, is the only person entitled to damages in respect thereof(*v*).

1294 *Husband and wife*(*w*).—If a man marries a woman seised in fee of certain lands and tenements, he gains a freehold interest therein in right of his wife; and if he is the actual occupier of them, he is, of course, entitled to sue for all damage done to his beneficial occupation and enjoyment of the property. If the wife, on her marriage, was possessed of chattels real, such as leasehold interests, estates by statute merchant, statute staple, etc., the husband will be entitled to them as a gift in law, and may, during the marriage, deal with them as the absolute owner of them; but if he fails to make any transfer or disposition of them in his lifetime, and his wife survives him, she will then take them by survivorship. The husband cannot devise them, but he may transfer them by deed(*x*). If the wife's estates have, prior to the marriage, been conveyed to trustees, the husband will then have no legal interest in the property, and no right to maintain an action for any damage that may be done to it.

If the husband, having and interest in the wife's real estate, grants leases thereof during their joint lives, reserving rent to himself and making his wife no party to the lease, then, as the reversion is in the husband, he is the proper person to sue for damage done to his reversionary estate(*y*), and for double value under 4 Geo. 2, c. 28, s. 1, for holding over by tenants after notice to quit(*z*). If a *feme sole* hath a right to have common for life, and she marries, and the husband is hindered in his enjoyment of the right of common, he alone may have an action for damages(*a*).

Actions for the conversion of the goods of a *feme covert* before her marriage, and for wrongs done to her before marriage, should be

(*u*) *Ante*, p. 1060. Hall *v.* Hollander, 4 B. & C. 662.

(*v*) Gladwell *v.* Steggall, 5 B. N. C. 736.

(*w*) See "The Married Women's Property Act, 1870," 33 & 34 Vict. c. 93. See Laws of New York, 1862, ch. 172; Laws of New York, 1860, ch. 90; New York Code, s. 114; Laws of New York, 1848, ch. 200.

(*x*) Bac. Abr. BARON AND FEME, C.

(*y*) Wallis *v.* Harrison, 5 M. & W. 142.

(*z*) Harcourt *v.* Wyman, 3 Exch. 824; 18 Law J., Exch. 453.

(*a*) Baker *v.* ——, 2 Bulstr. 14.

brought by the husband and wife jointly, as the chose in action in case of the death of the husband would survive to the wife; but if the wife sues alone on such chose in action, she will be entitled to damages, unless the non-joinder of the husband is pleaded in abatement(*b*). The marriage operates, as we have seen, as an absolute gift in law to the husband of all the goods and chattels and personal property of the wife. The husband, therefore, after the marriage, may demand possession of the chattels of the wife in the hands of a stranger; and if the latter has no lien upon them or right to detain them, and refuses or neglects to deliver them up to the husband, the latter may maintain an action for the detention or conversion of them without joining the wife, as the tort is to the husband: but if the action is brought for the conversion of deeds and securities relating to property and choses in action which would survive to the wife in case of the death of the husband, the wife would be properly joined with the husband for conformity(*c*).

So absolute is the husband's right to all chattels and personal property which come to his wife's hands after marriage, that if the wife buys wearing apparel out of money settled to her separate use, and received by her from her trustees, such wearing apparel vests by law in the husband as the legal owner thereof; and the same rule prevails with regard to money and all kinds of personalty, as soon as it is placed by the trustees in the hands of the wife in the execution of the trusts(*d*). In actions for the recovery of damages for a personal wrong or violence done to the wife, where the action would survive to her in the case of the death of her husband, the wife ought to be joined as a plaintiff, although the declaration sets forth and claims some special damage accruing to the husband; but where there is no injury to the person of the wife, and the action would not survive to her, the wife ought not to be joined, she having no legal interest in the damages to be recovered(*e*). The husband, for example, is alone entitled to sue for the loss of the services of his wife through the tortious act of the defendant, and for the expenses he has incurred in doctors and nurses in curing her of injuries resulting from an assault upon her by the defendant; but when damages are sought to be recovered for the bodily pain suffered by the wife from personal violence, or for injury to

(*b*) Milner *v.* Milnes, 3 T. R. 627. Morgan *v.* Cubitt, 3 Exch. 612. Dalton *v.* Mid. Count. Rail. Co., 13 C. B. 474.

(*c*) Ayling *v.* Whicher, 6 Ad. & E. 259.

(*d*) Carne *v.* Brice, 7 M. & W. 183. Bird *v.* Peagrum, 13 C. B. 649. See "The Married Women's Property Act, 1870," 33 & 34 Vict. c. 93.

(*e*) Saville *v.* Sweeney, 4 B. & Ad. 523.

her personal feelings from slanderous attacks upon her, the wife must be a plaintiff in the action, and the husband be joined with her for conformity(*f*).

By the old law, therefore, it was often necessary to bring separate actions for the recovery of the entire damage resulting from an injury to the person of the wife, in one of which the husband alone was made plaintiff, and in the other the wife was joined for conformity; but now, by the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, s. 40, it is enacted, that in any action brought by a man and his wife for an injury done to the wife, in respect of which she is necessarily joined as co-plaintiff, it shall be lawful for the husband to add thereto claims in his own right, and separate actions brought in respect of such claims may be consolidated if the court or a judge shall think fit; but it is provided that in the case of the death of either plaintiff, such suit, so far only as relates to the causes of action, if any, which do not survive, shall abate.

If a defendant has been guilty of a fraudulent representation that a chattel is fit for use, knowing that it is not, and making the representation in order that the chattel may be used by the plaintiff's wife, and the wife uses it and is injured, both the husband and wife may be properly joined in an action for the deceit, but the wife cannot be joined with the husband where the action is founded merely on a breach of warranty without proof of wilful deceit(*g*). If a person professing to sue as the husband of an injured female is not in truth her husband, he has no right to maintain the action. It is a good plea in bar, therefore, to an action professing to be an action by husband and wife for an injury done to the wife, to plead that the female plaintiff is not the wife of the male plaintiff(*h*).

Where the husband and wife were seized of a messuage for their joint lives and the life of the survivor, and all the estate and interest of the husband became vested in the defendant, who permitted waste during the lifetime of the husband, it was held that the wife who survived her husband, could not maintain an action against the defendant in respect of such waste(*i*).

1295 *Actions by married women after a judicial separation, or an order for protection.*—When a married woman is living separate from her hus-

(*f*) Dengate *v.* Gardiner, 4 M. & W. 6. For the proper parties under the New York statutes, see H. M. Filer *v.* New York Central R. R. Co., 49 N. Y. 47, 56; Ackley *v.* Tarbox, 31 N. Y. 564; Mann *v.* Marsh, 35 Barb. 68; Darby *v.* Callaghan, 16 N. Y. 71.

(*g*) Longmeid *v.* Holliday, 6 Exch. 761.

(*h*) Chantler *v.* Lindsey, 16 M. & W. 82.

(*i*) Bacon *v.* Smith, 1 Q. B. 345.

band under a decree for a judicial separation, she is considered as a *feme sole* for the purpose of suing for damages for any wrong or injury that she may have sustained(*j*). But until a decree for a judicial separation has been obtained, she ought, although she is living apart from her husband, to sue in his name for any trespass that may have been committed in her dwelling-house(*k*).

1296 *Infants* have a right to sue by guardian or *prochein ami* to recover damages for injuries done to their persons or property through the tortious act of another.

1297 *Heir-at-law, devisee, and personal representatives.*—All causes of action in respect of injuries of a continuing nature to real property descend with the property to the heir-at-law on the death of the ancestor, or vest in the devisee, remainderman, or personal representative, in whom the legal estate in the land may be vested by deed, will, or administration(*l*).

The heir-at-law is the proper person to maintain an action for the entire damage resulting from a nuisance of a continuing nature to land which comes into his possession by descent. Thus, where one John Rolf built a house so near to the house of Richard Rolf that the eaves of his said house did overhang the house of Richard, and pour water thereon, and afterwards both John and Richard died, and their respective houses descended to their respective sons and heirs-at-law, and the heir of Richard, on request made to him by the heir of John, did not reform the wrong, whereupon the latter brought an action against the heir of Richard, who did demur in law, it was adjudged that the action was maintainable, because the defendant did not on request reform the nuisance which his father had made, but suffered it to continue, to the prejudice and damage of the plaintiff, son and heir of him to whom the wrong was done(*m*).

So, where a nuisance erected on the land of a devisor in the lifetime of such devisor was continued afterwards in the time of the devisee, it was held that the devisee should have an action for it, for the continuance thereof is a new erecting of such nuisance(*n*).

When the reversionary interest of a deceased leaseholder, who has underlet the premises demised to him, becomes vested in his personal representatives, they are, of course, the proper persons to sue for

(*j*) 20 & 21 Vict. c. 85, s. 26; *ante*, pp. 1058, 1066.
(*k*) Boggett *v.* Frier, 11 East, 301.
(*l*) Vivian *v.* Champion, 2 Ld. Raym. 1126.
(*m*) 2 Hen. 413; 31 Ed. 3, Voucher, 272, cited in Penruddock's case, 5 Co. 101a. Gillon *v.* Boddington, cited 5 B. & C. 266.
(*n*) Some *v.* Barwish, Cro. Jac. 231.

damages in respect of permanent injuries to the property of a continuing nature, diminishing the value of their reversionary estate (*ante*, pp. 243, 357). When the damage done to real property was not of a continuing nature, but accrued wholly in the lifetime of the testator, the heir-at-law, devisee, or remainderman, could not sue in respect of it; neither could the personal representative, in consequence of the old maxim of the common law, *actio personalis moritur cum personâ*. Thus, if trespassers entered upon the land and cut down trees, or gathered, carried away, and sold growing crops and fruit; or set fire to buildings, and caused them to be utterly consumed, the heir could not sue, because the damage was sustained in the lifetime of the ancestor, and the personal representatives could not recover the damages that had been sustained, because they were personal to the deceased, and the remedy died with him(*o*). But by 3 & 4 Wm. 4, c. 42, s. 2, reciting that there was no remedy provided by law for injuries to the real estate of any person deceased, committed in his lifetime, it is enacted, that an action of trespass or case may be maintained by the executors or administrators of any person deceased for any injury to the real estate of such person, committed in his lifetime, for which an action might have been maintained by such person, so as such injury shall have been committed within six calendar months before the death of such deceased person, and provided such action shall be brought within one year after the death of such person.

On the death of an owner of goods and chattels in the hands of bailees and depositaries, the right of property in the chattels vests in the personal representatives, and if the bailee has no lien upon them, or interest in them, or right to detain them as against the owner, the personal representatives may demand possession of them; and if the bailee refuses to deliver them he may be sued for the detention or conversion of the property(*p*). Being themselves the owners of the property on the death of the testator or intestate, they are the proper persons to sue in respect of trespasses committed by persons who take the goods out of their actual or constructive possession, or out of the custody of their servants or agents(*q*); but they cannot, at common law, sue in respect of any detention or conversion of the property in the lifetime of the deceased owner, nor for a trespass in taking it away, by reason of the maxim *actio personalis moritur cum personâ*. To

(*o*) Adam *v.* Bristol, 2 Ad. & E. 389. Raymond *v.* Fitch, 2 C. M. & R. 597.
(*p*) Hollis *v.* Smith, 10 East, 292; *ante*, pp. 443–446, 553, *et seq.*
(*q*) Adams *v.* Cheverel, Cro. Jac. 113.

remedy this it was enacted by 4 Ed. 3, c. 7, that executors shall have actions for a trespass done to their testators in respect of the goods and chattels of the said testators carried away in their lifetime, and recover their damages in like manner as they whose executors they be should have had if they were in life. By 25 Ed. 3, c. 5, the benefit of this statute is extended to the executors of executors; and administrators are within the equity of the statute. It has been held that an action is maintainable by executors under this statute against a defendant for cutting down and carrying away a growing crop of wheat from the testator's land in his lifetime, because corn growing is a chattel; but that if the defendant had cut down the corn and let it lie, no action would have been maintainable by the executor; nor if grass had been cut and carried away by the defendant; because grass is part of the freehold(*r*).

As actions for personal wrongs die with the person, it follows that executors and administrators cannot maintain an action for a libel upon their deceased testator or intestate, or for an assault or false imprisonment, or any act of negligence or violence causing injury to the person, not ending in death. But if the declaration of the cause of action, though framed in tort, is in substance for a breach of contract which has damaged the personal estate of the testator, the action is maintainable, as the substance, and not the form, of the thing must be regarded. Thus, if a person contracts with a coach-proprietor to be safely and securely carried from one place to another, and through the negligence of such proprietor or his servant the coach be overturned, in consequence of which the passenger so contracting dislocates or fractures a limb, and owing to his confinement in procuring a cure, his personal property sustains an injury, although he, during his lifetime, would have the option to sue the proprietor either on contract or tort, still his representative may after his death maintain an action on the contract to carry him safely, and recover damages for the injury which has accrued to his personal estate from the breach thereof. Where the plaintiff suing as administrator set forth in his declaration that the defendant was employed by the intestate in his lifetime to act as his attorney to investigate the title to an estate the intestate had purchased, that the defendant entered upon the employment, but neglected to investigate the title, and caused the intestate to accept a defective title by representing it to be a good title, showing special damage to the personal estate, it was held that the action was clearly main-

(*r*) Emerson *v.* Emerson, 1 Ventr. 187.

tainable, as the intestate in his lifetime might have sued in contract as well as in tort(*s*). But as regards personal injuries unconnected with contract causing the death of the party injured, it has been enacted, as we have seen, by the 9 & 10 Vict. c. 93 (*ante*, p. 502), that whenever the death of a person has been occasioned by any wrongful act, or by neglect or default, such as if death had not ensued would have entitled the injured party to maintain an action, and recover damages in respect thereof, then the person who would have been liable if death had not ensued shall be liable to an action for damages, to be brought in the name of the executor or administrator of the person deceased, or by the persons beneficially interested.

1298 *Administrators.*—An action is maintainable by an administrator for a wrongful seizure by the defendant of the intestate's goods made between the death of the intestate and the grant of the letters of administration(*t*); and an action is maintainable in respect of goods wrongfully sold after the death of the intestate, and before the grant of letters of administration(*u*).

1299 *Trustees of bankrupts* may bring or defend any action, suit, or other legal proceeding relating to the property of the bankrupt(*v*). Such trustees also, where any portion of the property of the bankrupt consists of things in action, may institute suits in their official names, and such things shall, for the purposes of such action, etc., be deemed to be assignable at law, and to have been duly assigned to such trustee(*w*). In all actions by or against trustees of a bankrupt, the character in which the plaintiff or defendant is stated on the record to sue or be sued is not in any case to be considered in issue, unless it is specially denied(*x*). By the 106th, 107th, and 108th sections, provision is made for the admission in evidence in all courts of the various proceedings in bankruptcy, provided they purport to be sealed or signed as therein mentioned. And by the 109th section, judicial notice is to be taken of the various seals of the Court of Bankrupty, and the signatures of the judge or registrar of any such court. The production of the certificate of appointment of the trustee in bankruptcy under the seal of the court (see s. 18) would therefore (*semble*), be conclusive evidence of his title, although the seal was not in fact

(*s*) Knight *v.* Quarles, 4 Moore, 541.
(*t*) Tharpe *v.* Stallwood, 5 M. & Gr. 777.
(*u*) Foster *v.* Bates, 12 M. & W. 226.
(*v*) 32 & 33 Vict. c. 71, s. 25. As to their power to compromise disputes, see s. 27.
(*w*) Sect. 23. As to a trustee in bankruptcy fraudulently omitting to prosecute an action, see Benfield *v.* Solomons, 9 Ves. 84; Smith *v.* Moffat, L. R., 1 Eq. Ca. 397.
(*x*) Reg. Gen. Hil. T., 16 Vict., 1 Ell. & Bl. App. lxxix.

affixed till after the commencement of the action(*y*). A party to a suit, however, may, by his conduct and actions in dealing with trustees in bankruptcy, have so recognized their title as to be afterwards precluded from requiring formal proof of it(*z*).

1300 *Transfer of rights and liabilities ex delicto to trustees of bankrupts.*—We have already seen that all the real and personal estate and effects of bankrupts, with certain exceptions, are vested in the trustees in bankruptcy (*ante*, p. 424, *et seq.*). The trustees, therefore, are the proper parties to maintain an action for injuries done to real or personal property, which has become vested in them by reason of the bankruptcy(*a*); but they cannot maintain an action for injuries to the person of the bankrupt. They cannot sue, for example, for damages for a libel upon him, although the injury occasioned thereby to the man's reputation may have been the sole cause of his bankruptcy; nor can they sue for damages for an assault upon the bankrupt, or for the seduction of his servant(*b*); and the same may be said of some purely personal injuries arising out of breaches of contracts, such as contracts to cure or to marry; and if in these cases a consequential damage to the personal estate follows from the injury to the person, that damage may, nevertheless, be so dependent upon, and inseparable from, the personal injury, which is the primary cause of action, that no right to maintain a separate action in respect of such consequential damage will pass to the trustees. But where the primary and substantial cause of action is not, properly speaking, personal to the bankrupt, but the injury to the person is the consequence of an injury to the personal estate, the injury to the personal estate is the primary and substantial cause of action, and such right of action will pass to the trustees as part of the personal estate(*c*).

Where a plaintiff who had become bankrupt complained that the defendant had seized his goods under a false and pretended claim of right; that he was thereby much annoyed and prejudiced in his business, and believed to be insolvent; and that by means of the premises certain of his lodgers, being induced to believe that he was in embarrassed circumstances, and that the defendants were entitled to seize

(*y*) Kelly *v.* Moray, L. R., 1 C. P. 667. The 18th section, however, has the words "and such appointment shall date from the date of the certificate," which were not in the Act, 24 & 25 Vict. c. 134, under which the above case was decided.

(*z*) Dickinson *v.* Coward, 1 B. & Ald. 677. Inglis *v.* Spence, 1 Cr. M. & R. 433.

(*a*) Michell *v.* Hughes, 6 Bing. 689, although the bankrupt of whom they are trustees was an uncertificated bankrupt at the time of their appointment, *i.e.*, if the trustees under the first bankruptcy do not interfere. Morgan *v.* Knight, 33 Law J., C. P. 168.

(*b*) Howard *v.* Crawther, 8 M. & W. 601.

(*c*) Drake *v.* Beckham, 11 M. & W. 319. Hodgson *v.* Sidney, L. R., 1 Exch. 313.

the goods for a debt, quitted the house, and the declaration then claimed special damages, it was held, that as the jury were entitled upon the declaration as it stood to give vindictive damages for the personal injury far beyond the mere value of the goods, a plea of the bankruptcy of the plaintiff, and of the transfer of the causes of action to the assignees, afforded no answer to the plaintiff's claim(*d*). "There is no doubt," observes Lord Campbell, "that a cause of action which is exclusively confined to injury to property will pass to the assignees, but there is a difficulty when there is a mixed case of injury to the person and injury to property. It may be that in such a case the law will give an action to the bankrupt for the personal injury sustained by him, and an action to the assignees for the injury done to the property"(*e*).

If the bankrupt, notwithstanding his bankruptcy, continues in the possession and occupation of land which has been demised to him, he may maintain an action for trespasses or injuries done to the land, if the trustees do not interpose and take the lease(*f*). But if he goes away and abandons the possession of the premises, he has no right of action(*g*), unless he returns and resumes possession, with the assent of the trustees or the landlord, before any other person has entered and become the occupier of the property(*h*). If the trustees think fit to take to the lease, they are then the proper parties to sue for any trespass or injury committed upon the demised premises(*i*).

1301 *Right of the trustees to the bankrupt's wife's choses in action.*—When a right of action of the bankrupt's wife is of such a character that if vested in the bankrupt alone, it would have passed to the trustees, such right of action passes to the trustees, subject to the condition that it is reduced into possession by them during the joint lives of the husband and wife, and that may be done in a joint action by the trustees and the wife(*j*).

1302 *Of the number of the plaintiffs in actions ex delicto—Joint and separate rights of action.*—Joint tenants of lands, and all persons having a joint interest in property, real or personal, should be joined as plaintiffs in actions for damages for injuries done to their joint property, as we

(*d*) Brewer *v.* Drew, 11 M. & W. 625.

(*e*) Rogers *v.* Spence, 12 Cl. & Fin. 720. But see per Bramwell, B., in Hodgson *v.* Sidney, *supra*; and Morgan *v.* Steble, L. R., 7 Q. B. 611.

(*f*) See s. 23, which provides that if the trustees disclaim any lease or other onerous property, the lease shall be deemed to be surrendered from the date of the order of adjudication.

(*g*) Clark *v.* Calvert, 8 Taunt. 752.

(*h*) Topham *v.* Dent, 6 Bing. 515.

(*i*) Hancock *v.* Caffyn, 8 Bing. 367.

(*j*) Richbell *v.* Alexander, 30 Law J., C. P. 208.

have already seen. Tenants in common should also, as we have seen, be joined as plaintiffs in actions for injuries to their common property, such as trespasses upon their land, nuisances to their estates, and for all trespasses and injuries to their common property; because, though their estates are several, yet the damages survive to all, and it would be unreasonable for them to bring several actions for one single injury(*k*). If a nuisance to the land of two tenants in common be continued after the death of one of them, the devisee of the deceased tenant in common should join the survivor in an action for such nuisance(*l*).

Trustees in bankruptcy taking, as they do, a joint interest in the bankrupt's estate, should all be joined as plaintiffs in an action brought by them in their respective character in respect of injuries to such estate(*m*).

But parties cannot properly be joined as plaintiffs in an action where the wrong done to one is no wrong to the other, as in the case of false imprisonment, assault, and personal injuries(*n*). If slander is published concerning two partners, containing imputations injurious to them in their trade and affecting their joint interests, they may sue jointly for damages(*o*).

Where the duty springs out of a joint contract, if either of the parties has a separate interest, he may sue separately in respect of such separate interest(*p*). Thus, where the defendants, who carried on the business of accountants, were called in to adjust the accounts and settle the balance due to each of three partners separately, it was held, that the defendants owed a duty as well to each member of the firm as to the three, that there was a contract with each partner individually, as well as a contract with the firm collectively, and that one partner alone might maintain an action for the damage sustained by him individually by reason of the negligence of the defendants in making out the accounts(*q*).

Provision is made, as we shall presently see (*post*, s. 3), by the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, for amending a

(*k*) Hare *v.* Geley, Cro. Eliz. 148. Some *v.* Barwish, Cro. Jac. 231. De Puy *v.* Strong, 37 N. Y. 372. Bullock *v.* Hayward, 10 Allen (Mass.), 460. Alford *v.* Dewin, 1 Nev. 207. White *v.* Brooks, 43 N. H. 402. May *v.* Slade, 24 Texas, 205.

(*l*) Bac. Abr., Joint-Tenants, etc., K.

(*m*) Snelgrove *v.* Hart, 2 Stark. 424. Jones *v.* Smith, 1 Exch. 831.

(*n*) Barratt *v.* Collins, *ante*, p. 718.

(*o*) Le Fanu *v.* Malcolmson, 1 H. L. C. 637; *ante*, p. 971.

(*p*) Eccleston *v.* Clipsham, 1 Wms. Saund. 154.

(*q*) Story *v.* Richardson, 8 Sc. 291; 6 B. N. C. 123. The same rule prevails under the North Carolina Code. Howland *v.* Gardner, 69 N. C. 53.

non-joinder or mis-joinder of plaintiffs, either before or at the trial, upon such terms as the court or a judge may think proper.

By 23 & 24 Vict. c. 126, s. 19, it is enacted, that the joinder of too many plaintiffs shall not be fatal, but every action may be brought in the name of all the persons in whom the legal right may be supposed to exist; and judgment may be given in favor of the plaintiffs by whom the action is brought, or of one or more of them, or, in case of any question of mis-joinder being raised, then in favor of such one or more of them as shall be adjudged by the court to be entitled to recover. Provided always, that the defendant, though unsuccessful, shall be entitled to his costs occasioned by joining any person or persons in whose favor judgment is not given, unless otherwise ordered by the court or a judge.

SECTION II.

OF ACTIONS EX DELICTO AND THE PARTIES TO BE MADE DEFENDANTS IN SUCH ACTIONS(r).

1303 *Tenants in common.*—If one tenant in common misuse that which he has in common with another, he is answerable to the other in an action as for misfeasance(s). He is responsible to his co-tenant in common, as we have seen, for cutting down trees, or pulling down walls, or the doing of any act tending to the lasting injury of the common property(t). So an action of trespass is maintainable by one tenant in common against his co-tenant in common for digging and

(r) Parties to be made defendants in particular actions have already been considered under their appropriate heads. See Index, *in voce*.

(s) Ld. Kenyon, C.J., Martin v. Knowllys, 8 T. R. 145. McLellan v. Jenness, 43 Vt. 183. Pillsbury v. Moore, 44 Me. 154.

One tenant in common, or joint owner, cannot maintain replevin against his co-tenant. Davis v. Lottich, 46 N. Y. 393. Holton v. Binns, 40 Miss. 491.

One tenant in common is not liable to his co-tenant in an action of trover for taking, carrying away, and withholding from his co-tenant the common property. Ballou v. Hale, 47 N. H. 347. See Carr v. Dodge, 40 N. H. 406; Keisel v. Earnest, 21 Penn. St. 90.

But if a tenant in common sells or attempts to sell the common property, this terminates the tenancy in common and the remaining tenant may maintain trover against his former co-tenant. White v. Brooks, 43 N. H. 402. Cowles v. Garrett, 30 Ala. 341. Barton v. Burton, 1 Williams (Vt.) 93.

(t) Holt, C.J., Waterman v. Soper, 1 Ld. Raym. 737. Cubitt v. Porter, *ante*, p. 353. Elwell v. Burnside, 44 Barb. 447.

carrying away brick-earth or turf, as it destroys the subject-matter of the tenancy in common, and amounts in contemplation of law to an actual ouster(*u*). The putting of a lock upon a gate, however, by one tenant in common, without more, is not sufficient evidence of ouster to sustain an action of trespass(*v*).

1304 *Corporations.*—A corporation, by accepting a grant of land from the crown upon certain conditions as to the repair of sea-walls and defences, may render themselves liable to an action of tort at the suit of any party sustaining any private and peculiar damage from the non-repair of such sea-walls, etc.(*w*). A corporation may also be made responsible in an action for a trespass in breaking and entering a close, and for seizing goods, for every corporate body is liable in tort for the tortious acts of its agents and servants acting in the ordinary service of the corporation, without any order or authority under its common seal(*x*). A corporation may give a warrant to distrain without deed, and thus render itself responsible for a wrongful distress, and the jury may infer the agency of the corporation in the matter of a wrongful distress or seizure of goods from the fact of their having received the proceeds of the seizure(*y*).

Individuals constituting a foreign corporation cannot be made personally liable for its contracts or torts in this country(*z*); but the corporation, if it carries on business here, may (*semble*) be sued on a cause of action arising in this country, and service upon the head officer of the English branch is sufficient(*a*).

An action for a wrong lies against a corporation where the thing done is within the purpose of the corporation, and it has been done in such a manner as to constitute what would be an actionable wrong if done by a private individual. Therefore, where an action was brought against the London General Omnibus Company for interfering with the rights of the plaintiff, by driving their omnibuses in such a manner as to molest him in the use of the highway, it was held that as the company was incorporated for the purpose of driving omnibuses, and the whole of the wrongful acts charged in the declaration of the cause of

(*u*) Wilkinson *v.* Haygarth. 12 Q. B. 845. A tenant in common can maintain trespass against his co-tenant only in case of an unequivocal ouster. Filbert *v.* Hoff, 42 Penn. St. 97. Bishop *v.* Blair, 36 Ala. 90. Halford *v.* Tetherow, 2 Jones' Law (N. C.), 398.

(*v*) Jacobs *v.* Seward, L. R., 5 Engl. & Ir. App. 464.

(*w*) Mayor, etc., of Lyme Regis *v.* Henley, 1 B. N. C. 240.

(*x*) Maund *v.* Monm. Rail. Co., 4 M. & Gr. 452; 5 Sc. N. R. 457. See *ante*, p. 720.

(*y*) Smith *v.* Birm. Gas Co., 1 Ad. & E. 526.

(*z*) General Steam Nav. Co. *v.* Guillou, 11 M. & W. 877. Merrick *v.* Van Santvoord, 34 N. Y. 208.

(*a*) Newby *v.* Colt's Patent Fire-Arms Co., L. R., 7 Q. B. 293.

action were acts connected with the driving of their vehicles along the public highway, and were, therefore, within the purpose of their incorporation, an action for damages was maintainable against them. "We think it extremely important," observes Erle, J., "where such companies admit that they have in fact intentionally committed a wrong, that the public should have a remedy against them, and not be driven to an action against their servants and others whom they have employed, and who may be entirely incapable of giving the recompense which the law may award "(*b*).

A corporation may become liable in damages for the improper and careless construction and management of dangerous premises and dangerous machinery(*c*); for an assault and battery, or false imprisonment, committed by its servants in the exercise of its orders, or in the discharge of their duty, without proof of any authority under seal from the corporation(*d*). But where a corporation have employed a solicitor to conduct legal proceedings, the corporation are not necessarily liable for unlawful acts of which the solicitor may have been guilty in the conduct of the proceedings(*e*), nor is his appearance to conduct a prosecution necessarily evidence as against the company that they ratified the assault complained of(*f*). A corporation aggregate may, as we have seen, be made responsible for the negligence and unskilfulness of its servants in the execution of the ordinary work and business of the corporation, without any proof that the work was ordered under the common seal(*g*).

It has been thought that an action for a malicious prosecution is not maintainable against a corporation aggregate(*h*), but express malice may be imputed to, and proved against, a corporation, and an action of libel may consequently be maintained against a corporation for the publication of libellous intelligence through the medium of their servants, acting in the course of their ordinary employment in the management of an electric telegraph(*i*). If it be essential to the conversion of property by a corporation that the act of conversion should have been authorized by them under their common seal, a jury may, from proof that the conversion was committed by the servants and

(*b*) Green *v.* Lond. Gen. Omnibus Co. 29 Law J., C. P. 13.
(*c*) Cowley *v.* Mayor, etc., of Sunderland, *ante*, p. 490.
(*d*) Eastern Co. Rail. Co. *v.* Broom, 6 Exch. 314. Goff *v.* Gt. North. Rail. Co., *ante*, p. 708.
(*e*) Eggington *v.* Mayor of Lichfield, 5 Ell. & Bl. 113.
(*f*) Walker *v.* South-East. Rwy., L. R., 5 C. P. 643.
(*g*) Scott *v.* Mayor, etc., of Manchester, *ante*, p. 884.
(*h*) Stevens *v.* Mid. Co. Rail. Co., 10 Exch. 352. Owsley *v.* Montgomery, etc., R. R. Co., 37 Ala. 560. But see *ante*, p. 762, note *a*.
(*i*) Whitfield *v.* S. E. Rail. Co., 27 Law J., Q. B. 229; Ell. Bl. & Ell. 121.

agents of the corporation in the exercise of their ordinary employment and service, presume that the act was done under their common seal(*j*). And in the case of corporations called into existence for trading purposes, and carrying on trade through the medium of their servants and agents, the corporation may be made responsible for a conversion of property by such servants and agents, acting in the ordinary course of their employment in the business of the corporation(*k*). If the wrongful act was not done by the servant or agent of the corporation in the exercise of his ordinary employment, or in the discharge of his ordinary duties as servant of the corporation, it must be shown that the corporation has ratified and adopted the act.

1305 *When a joint-stock company is responsible for the tortious acts of the directors and managers.*—We have already seen that railway companies and joint-stock companies are responsible for the tortious acts of their directors and managers, when acting in the discharge of their official duties, and within the scope of their authority as the managers of the company (*ante*, pp. 707, 720). Where the plaintiff set forth that he was entitled to certain "ear-marked shares" in a railway company, that these shares had been wrongfully declared forfeited, that the forfeiture had been confirmed at a general meeting of the shareholders of the company, and the shares directed to be sold, it was held that there was a good cause of action against the company. So, where the directors had been guilty of a wrongful act of omission in not registering the plaintiff's name in their books, whereby the plaintiff was deprived of the ordinary privileges of a shareholder, and of any profits that might have arisen upon the shares, it was held that the company was responsible for the wrongful acts of the directors(*l*).

But where the directors have acted beyond the scope of their authority the company is not responsible for their acts, but the directors themselves are the parties to be made personally responsible in damages. Thus, where directors have signed false and fraudulent reports of the state and circumstances of a joint-stock company, such directors, and not the company, are the proper parties to be sued for the damages resulting from the misrepresentation. No body of shareholders can authorize directors to put forward fraudulent representations and false accounts of the transactions of the company, so as to render the company at large responsible for the fraud. That is a

(*j*) Yarborough *v.* Bank of England, 16 East, 6.
(*k*) Giles *v.* Taff Vale Rail. Co., 2 Ell. & Bl. 831.
(*l*) Catchpole *v.* Ambergate, etc., Rail. Co., 1 Ell. & Bl. 120.

course which no body of shareholders could sanction against a single dissentient, or against a single absent, shareholder. Where, therefore, false reports of the actual condition and circumstances of a joint-stock company were knowingly and designedly printed and circulated by the defendants and others in concert with them, with their signatures attached, and the plaintiff, relying upon the representations contained in these reports of the flourishing state of the concern, bought shares in it, and lost his money, and incurred serious liabilities, it was held that he was entitled to maintain an action for damages against the defendants(*m*).

1306 *Trustees and commissioners of public works.*—We have already seen that commissioners acting strictly in the execution of a statutory authority, and not exceeding their jurisdiction or powers, are not personally responsible, nor are their officers or servants acting under them personally responsible, in an action for damages, to a private individual who has sustained damage from their authorized acts(*n*); but if they act in a careless and oppressive manner, and are guilty of negligence or misconduct in the execution of the statutory authority, they are, as we have seen, responsible in damages for the consequences of their acts(*o*). Under certain Acts of Parliament, trustees and commissioners acting in the discharge of public duties are, as previously mentioned, relieved from all personal liability whilst acting in the execution of the powers of the statute (*ante*, p. 889), but are charged with the duty of imposing rates and collecting a fund, out of which all the expenses incurred in carrying the Act into execution are to be made good (*ante*, p. 890).

When it is provided by statute that commissioners or trustees appointed for the execution of public works shall be sued by their clerk, or treasurer, or public officer, an action is not maintainable against such officer, except where it could have been supported against the commissioners or trustees themselves(*p*); but whenever there has been a breach of duty on the part of the commissioners or trustees causing a private injury to another, an action is maintainable against their clerk or public officer to recover compensation for such breach of duty(*q*). The clerk is not in general personally liable to make com-

(*m*) *Ante*, pp. 1009, 1037. Davidson *v.* Tulloch, 3 Macq. 783.

(*n*) See Cracknell *v.* Mayor, etc., of Thetford, L. R., 4 C. P. 629, as to Commissioners for the improvement of navigation.

(*o*) *Ante*, pp. 882–894. Boulton *v.* Crowther, 2 B. & C. 706. Sutton *v.* Clarke, 6 Taunt. 43 Harris *v.* Baker, 4 M. & S. 29.

(*p*) Hall *v.* Smith, 2 Bing. 156.

(*q*) Cane *v.* Chapman, 5 Ad. & E. 647

pensation out of his own private means, he being only the nominal defendant; but the funds of the trustees or commissioners may be made answerable for satisfaction of the damages(*r*).

1307 *Military and naval officers* are not responsible for arrests made by them in the exercise and discharge of their military and naval authority(*s*); but if they exceed their authority, and make arrests, for offences which are not military offences, and over which they have no jurisdiction or authority, they will be responsible in damages for their unlawful acts(*t*).

1308 *Master and servant.*—The maxim, *qui facit per alium facit per se*, renders the master liable, as we have already seen, for all the negligent acts of the servant in the course of his ordinary employment(*u*).

1309 *Principal and agent*(*x*).—In order to make the principal liable in tort for an injury caused by the wrongful act of the agent, it must be shown that the act was within the scope of the authority given by the party against whom the action is brought, for if the servant was not acting in the due course of his employment for his master, but in contravention of his duty to him, and against his interest, the master is not, as we have seen, responsible for the consequences of the act(*y*). Where a railway passenger was taken into custody by a railway servant by command of a superintendent, for travelling on the railway without having paid his fare, with intent to avoid payment thereof(*z*), and the charge fell to the ground, and an action was brought against the company for an unlawful imprisonment, it was held that they were liable in damages, for it must be presumed that a superintendent of traffic, or of police, and all officers in authority, upon the line, or at the station, had power on behalf of the company to determine whether the servant of the company should, or should not, arrest persons for criminal frauds upon the company(*a*).

(*r*) Wormwell *v.* Hailstone, 6 Bing. 676.

(*s*) Bradley *v.* Arthur, 4 B. & C. 305. But he is, for oppression or undue harshness of his subordinates in making an arrest under his command. McCall *v.* McDowell, 1 Abb. (U. S.) 212. Compare Hickey *v.* Huse, 56 Me. 493.

That a Confederate officer is responsible for arrests made by him while in the service of the Confederate States. See Caperton *v.* Martin, 4 W. Va. 138; Caperton *v.* Nickel, id. 173; Caperton *v.* Bowyer, id. 176; Caperton *v.* Ballard, id. 420; French *v.* White, id. 170; and see Nadenbousch *v.* Sharer, id. 203; Carskadon *v.* Johnson, id. 356; Ruffner *v.* Williams, 3 W. Va. 243; Whitmore *v.* Allen, 33 Texas, 355.

(*t*) Warden *v.* Bailey, 4 Taunt. 67.

(*u*) *Ante*, pp. 29–34, 505, *et seq.* Sharrod *v.* Lond. & N. W. Rail. Co., 5 Exch. 585.

(*x*) See *ante*, pp. 1036, 1037.

(*y*) Coleman *v.* Riches, 16 C. B., 104; 24 Law J., C. P. 125. Udell *v.* Atherton, 7 H. & N 181. See *ante*, p. 476.

(*z*) See 8 Vict. c. 20, ss. 103, 104.

(*a*) Goff *v.* Gt. North Rail. Co., 30 Law J., Q. B., 148, qualifying and explaining Roe *v.* Birkenhead, Lanc., etc., Rail. Co., 7 Exch. 41. See *ante*, p. 707.

1310 *Subsequent ratification and adoption of a wrongful act by parties for whose use and benefit the act was done.*—"He that receiveth a trespasser, and agrees to a trespass after it is done, is no trespasser," observes Lord Coke, "unless the trespass was done to his use or for his benefit, and then his agreement subsequent amounteth to a precedent commandment, for in that case *omnis ratihabitio retrotrahitur et mandato priori æquiparatur*"(*b*). But to make the subsequent ratification equivalent to a precedent commandment, the act of trespass must have been committed in the name, and avowedly on behalf and for the benefit, of the party subsequently ratifying it. If the trespass was not done for his use or benefit, or he is not in a situation to have originally commanded the act, then his subsequent assent does not make him a trespasser(*c*). "It is a known and well-established rule of law," observes Tindal, C.J., "that an act done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal if subsequently ratified by him. In that case the principal is bound by the act, whether it be for his detriment or advantage, and whether it be founded on a tort or a contract, to the same extent and with all the consequences which follow from the same act if done by his previous authority. Such was the precise distinction taken in the Year Book, 7 Hen. 4, fo. 35, where it was held that if a bailiff took a heriot, claiming property in it himself, the subsequent agreement of the lord would not amount to a ratification of his authority as bailiff at the time; but if he took it at the time as bailiff of the lord, and not for himself, without, however, any command of the lord, yet the subsequent ratification by the lord made him bailiff at the time"(*d*).

1311 *What amounts to evidence of ratification of a wrongful act.*—But to make a man a trespasser by relation from having ratified and adopted an act of trespass done in his name, and for his benefit, it must be shown that the act was ratified and adopted by him with full knowledge of its being a trespass, or of its being tortious, or it must be shown that in ratifying and taking the benefit of the act he meant to take upon himself, without inquiry, the risk of any irregularity which might have been committed, and adopt the transaction, right or wrong. Promises to make inquiries, expressions of disapprobation of the conduct of the agent, accompanied by offers of compromise and overtures

(*b*) 4 Inst. 317. Dallas, C.J., Hull *v.* Pickersgill, 1 B. & B. 282.
(*c*) Wilson *v.* Barker, 4 B. & Ad. 616; 1 N. & M. 409. Nicoll *v.* Glennie, 1 M. & S. 592.
(*d*) Wilson *v.* Tummon, 6 Sc. N. R. 906; 6 M. & Gr. 242. Woollen *v.* Wright, *ante*, p. 369.

to purchase peace by returning the property taken, or paying the value of it, are of themselves no evidence of the ratification of the wrongful act(*e*).

1312 *Servants and agents.*—All persons procuring, commanding, aiding, or assisting in the commission of a trespass, are principals in the transaction, and persons assenting to a trespass after it has been done may also become trespassers. Both the master who commands the doing, and the servant who does an act of trespass, may be made responsible as principals, and sued jointly for damages(*f*). A servant keeping the key of a room, knowing that a man is imprisoned therein, is a trespasser(*g*). Where an arrest has been made under process, which is afterwards set aside for irregularity, both the attorney who sued out the process and the client who set the attorney in motion may be sued for the assault and false imprisonment (*ante*, p. 720). The servant is, as we have seen, equally liable with the master in respect of his own personal participation in a wrongful act, and cannot discharge himself from liability on the ground that he acted under unavoidable ignorance and in obedience to his master's orders, nor can he justify under any authority from his master when his master had no authority in the matter(*h*). A servant may, as we have seen, be liable for a conversion to which he is a party, though he is acting in obedience to the commands of his master, and under authority from him(*i*).

1313 *Husband and wife.*—The husband is by law answerable for all actions for which his wife stood attached at the time of the marriage, and also for all her torts and trespasses during coverture; but the action must be against them both jointly, for if she alone were sued, it might be a means of making the husband liable, without giving him an opportunity of defending himself(*k*). The husband takes his wife with all her obligations and liabilities. If, therefore, at the time of her marriage she is tenant of certain premises, and has received notice to quit, the husband after the marriage incurs the obligation of giving up possession of the premises, and may render himself liable to an

(*e*) Roe *v.* Birkenhead, etc., Rail. Co., 7 Exch. 36.

(*f*) Bates *v.* Pilling, 6 B. & C. 38. Williamson *v.* Fischer, 50 Mo. 196. Berry *v.* Fletcher, 1 Dill. 67. McManus *v.* Lee, 43 Mo. 206. Smith *v.* Felt, 50 Barb. 612. Shepherd *v.* McQuilkin, 2 W. Va. 90. Lewis *v.* Johns, 24 Cal. 629. Allred *v.* Bray, 41 Mo. 484. Woodbridge *v.* Conner, 49 Me. 353. Wallace *v.* Miller, 15 La. An. 449. McNeeley *v.* Hunton, 30 Mo. 332.

(*g*) Bro. Abr. TRESPASS, pl. 133, 256, 265.

(*h*) Stephens *v.* Elwall, 4 M. & S. 261. Bennett *v.* Bayes, 5 H. & N. 391; 29 Law J., Exch. 224.

(*i*) Perkins *v.* Smith, 1 Wils. 328. Davies *v.* Vernon, 6 Q. B. 443. See *ante*, pp. 400, 401.

(*k*) Bac. Abr. BARON AND FEME, L.

action for double value for holding over; for if the wife incurs the penalty the husband will have to pay it, and he cannot get rid of the obligation by pleading ignorance, for it is his duty to make inquiry, not by showing that his wife deceived him, or concealed the notice to quit(*l*).

The husband must be sued jointly with the wife for an assault or libel committed by the wife, or for the destruction or conversion of property by the wife, or for any act of trespass committed by her during the coverture(*m*). He continues answerable in damages to all

(*l*) Lake *v.* Smith, 1 B. & P., N. R. 179.

(*m*) Catterall *v.* Kenyon, 3 Q. B. 315. Keyworth *v.* Hill, 3 B. & Ald. 686. Draper *v.* Fulkes, Yelv. 165. Horton *v.* Payne, 27 How. (N. Y.) 374.

The New York Code provides that when a married woman is a party, her husband must be joined with her, except that: 1. When the action concerns her separate property, she may sue alone; 2. When the action is between herself and her husband, she may sue or be sued alone; and in no case need she prosecute or defend by a guardian or next friend. Code, s. 114. A statute of the same State declares that any married woman, may, while married, sue and be sued in all matters having relation to her sole and separate property, in the same manner as if she were sole. Laws of 1860, ch. 90, s. 8.

At common law the husband was liable for the personal torts of his wife upon the theory that the marriage subjected the person of the wife to the dominion and control of her husband so that the commission of a tort by her was, in a degree at least, the result of his fault or omission. The statutes above given, leave unaffected this liability of the husband for the strictly personal torts of the wife. Rowe *v.* Smith, 45 N. Y. 230. Baum *v.* Mullen, 47 N. Y. 577.

But these statutes have wholly changed the common-law rule in respect to the liability of the husband for injuries committed by or arising out of the management of property owned by the wife. Thus, at common law, the husband is solely liable for the trespasses of cattle, damage-feasant, belonging to the wife at the time of marriage, and straying from her land. Under these statutes the wife alone is liable, even though her husband and children reside with her upon the lands, and both the land and the cattle are used for the support of the family. Id.

The change in the liability in such cases grows out of the change made by the statutes in the control during coverture of the property owned by the wife at the time of marriage.

At common law the husband, in the absence of any trust, acquired by marriage the right to the use, during their joint lives, of the real estate which the wife then owned, or which she might thereafter acquire, and the absolute title to her chattels; and he was liable for such trespasses upon the theory that, being in possession of the real estate, and owner of the cattle by which the trespasses were committed, he was bound to so control them that they should not trespass upon the premises of others. Under the statutes the husband has no right to the use of his wife's real estate, or to the possession of her personal property; and the duty which made him liable at common law, under the statutes devolves upon her. Rowe *v.* Smith, 45 N. Y. 230.

So where a husband and wife live upon premises, the separate property of the latter, the wife alone is responsible for injuries sustained by a third person from falling into a pit carelessly left uncovered thereon. In order to make him jointly or severally liable for such injuries, it must be shown that he participated in the wrong, or that there was an obligation upon his part to obviate the cause. Fiske *v.* Bailey, 51 N. Y. 150.

So a married woman is, under these statutes, liable for fraudulent representations made by her husband, acting as her agent in the sale of her real estate; and in an action for such fraud the husband need not be joined. Baum *v.* Mullen, 47 N. Y. 572.

And generally, although the common-law liability for the mere personal torts of his wife have never been changed in New York by the recent statutes, yet, when such torts are committed in the management and control of her separate property, the rule is changed, and the wife is liable as if unmarried, and can be sued in the same manner. Id.

As to the nature and extent of the husband's common-law liability for the acts of the wife, see Kowing *v.* Manly, 49 N. Y. 192.

persons who have been injured by the wrongful act of the wife so long as the relation of husband and wife continues, though they are living apart(*n*), unless they are separated under a decree of judicial separation, 20 & 21 Vict. c. 85, s. 26, or the wife has obtained a protecting order under s. 21, in which case the husband is not liable for the wife's tortious acts. If the marriage be dissolved, the husband cannot be sued jointly with the wife for a tort committed during the coverture(*o*).

Where a married woman signed and delivered a distress-warrant to a bailiff, and directed him to distrain the goods of a tenant, under the impression that she had a right to distrain when she had no such right, and the bailiff having been sued and compelled to pay damages for the illegal distress, brought an action of tort for deceit against the wife and her husband, it was held that the action was not maintainable, as it was not founded upon an alleged assertion of the wife that she had a right to distrain, and there could be no retainer of the plaintiff to distrain given by the wife, nor any contract by her to indemnify him(*p*).

The husband of an executrix or administratrix is liable in respect of all assets received and wasted, and devastavits committed by himself or by his wife during the coverture, and his estate remains liable after his death(*q*).

After the death of the wife, or dissolution of the marriage (see *supra*) the husband is discharged from all responsibility for her tortious acts, unless he himself participated therein, or authorized or instigated them, in which case he will be responsible, like any other master who has committed a tortious act through the medium of his servant. After the death of the husband the wife may be sued alone for all tortious acts in which she has participated, whether she was a sole actor in them or whether they were committed by her at the instigation or under the influence and direction of her husband(*r*). And the same rule of law prevails where the husband has abjured the realm, or has been transported, and is thereby *civiliter mortuus*(*s*).

In every case of a judicial separation, or divorce *a vinculo matrimonii*, or a protecting order, the wife so separated, or divorced, is considered a

(*n*) Head *v.* Briscoe, 5 C. P. 484.
(*o*) Capel *v.* Powell, 34 Law J., C. P. 168. Kowing *v.* Manly, 49 N. Y. 192, 201.
(*p*) Rawlings *v.* Bell, 1 C. B. 959. See Liverpool Adelphi Loan, etc., *v.* Fairhurst, Wright *v.* Leonard, *ante*, p. 44.
(*q*) Smith *v.* Smith, 21 Beav. 385.
(*r*) Vine *v.* Saunders, 4 B. N. C. 102. As to damages in the latter case, *quære*, see per Bosanquet, J., *S. C.*
(*s*) Bac. Abr. BARON & FEME, M.

feme sole, for the purpose of being sued for wrongs and injuries done by her, and her husband is not liable for any wrongful act or omission by her(*t*).

1314 *Infants.*—An infant in the actual occupation of land is responsible for nuisances and injuries to his neighbor, arising from the negligent use and management of the property. A man who has made a contract with an infant cannot convert anything that arises out of that contract into a tort, and seek to enforce the contract through the medium of an action of tort. Therefore, where a lad hired a mare, and injured it by immoderate riding, it was held that a plea of infancy was an answer to the action, the action being founded on contract(*u*). But where a horse is hired for one purpose and is used for another, or is let out to be used by one person, and he allows it to be used by another, there is a tort independent of contract. And, therefore where an infant hired a horse on the terms that it was to be ridden on the road and not over fences in the fields, and the infant having got possession of the horse lent it to a friend, who took it off the high-road, and in endeavoring to jump the animal over a hedge transfixed it on a stake and killed it, it was held that the infant was responsible in damages for the value of the horse(*x*).

An infant is not liable for the conversion of goods if the cause of action is grounded on matter of contract with the infant, and constitutes a breach of contract as well as a tort(*y*). Neither is he liable, as previously mentioned, to an action for a fraudulent representation or a

(*t*) 20 & 21 Vict. c. 85, ss. 21, 26. Capel *v.* Powell, *supra*.

(*u*) Jennings *v.* Rundall, 8 T. R. 335. Eaton *v.* Hill, 50 N. H. 235.

(*x*) Burnard *v.* Haggis, 32 Law J., C. P. 89. If an infant hire a horse and wilfully and intentionally injure the animal he thereby disaffirms the contract and is liable in trespass. Campbell *v.* Stakes, 2 Wend. 137. Wentworth *v.* McDuffie, 48 N. H. 402.

So if an infant hire a horse to go a particular journey and goes beyond or deviates from the place of destination he is liable for a conversion. Fish *v.* Ferris, 5 Duer, 49. Homer *v.* Thwing, 3 Pick. 492. Eaton *v.* Hill, 50 N. H. 235. Towne *v.* Wiley, 23 Vt. 353. But see Penrose *v.* Curren, 3 Rawle, 351; Schenck *v.* Strong, 1 South. 100.

So an infant is liable for an assault. Bullock *v.* Babcock, 3 Wend. 391. Or for having procured another to commit an assault and battery. Sikes *v.* Johnson, 16 Mass. 389. So an infant, and not his father, is answerable for his own trespass. Tifft *v.* Tifft, 4 Denio, 175. Or for obtaining goods fraudulently with an intention not to pay for them. Wallace *v.* Morss, 5 Hill, 391.

If the tort or fraud of an infant arises from a breach of contract, although there may have been false representations or concealment respecting the subject matter of it, the infant cannot be charged for this breach of his promise or contract by a change of the form of action. But if the tort is subsequent to the contract, and not a mere breach of it, but a distinct, wilful and positive wrong of itself, then although it may be connected with a contract the infant is liable. Fitts *v.* Hall, 9 N. H. 441. See Prescott *v.* Norris, 32 N. H. 103. Thus an infant is liable for deceit in falsely representing himself to be of age, and thereby inducing another to sell him goods on credit, and afterwards avoiding his promise to pay by pleading infancy. Fitts *v.* Hall, 9 N. H. 441.

(*y*) Manby *v.* Scott, 1 Sid. 129.

breach of warranty(*z*), where a contract made by means of the misrepresentation or a breach of warranty(*z*), where a contract made by means of the misrepresentation or a sale effected through the false warranty is substantially the cause of action; nor is he chargeable on the custom of the realm as a common innkeeper. But if an infant gets goods into his hands by fraud and false pretences, or under color of a pretended contract, and then refuses to deliver up the goods on the demand of the party who has been defrauded of the possession of them, he cannot, if the goods were in his hands or under his control at the time they were demanded back, set up his minority as a defence to an action grounded on such demand and refusal(*a*).

Where an action for money had and received was brought against an infant to recover money which the infant had embezzled, Lord Kenyon said that infancy was no defence to the action; that infants were liable to actions *ex delicto*, though not *ex contractu:* and though the action was in form an action of the latter description, yet it was *ex delicto* in point of substance; that if an action of trover had been brought for any part of the property embezzled, or an action grounded on the fraud, infancy would have been no defence; and that as the object of the action was precisely the same, his opinion was that the same rule of law should apply(*b*).

1315 *Executors and administrators.*—An action does not in general lie at common law against executors to recover damages for waste committed by their testator, it being a tort which dies with the person(*c*). They are not responsible in damages for injuries done by their testator in cutting down another man's trees, or for trespasses committed by him in entering in his lifetime upon another man's land, and prostrating fences, or digging therein, where the wrong-doer acquires no gain to himself from the commission of the wrong; but wherever by the wrong done property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. So far as the tort itself goes, an executor shall not be liable; but so far as the act of the offender is beneficial to his personal estate, his assets ought to be answerable, and his executor therefore shall be

(*z*) *Ante*, p. 1080. Howlett *v.* Haswell 4 Campb. 118. Green *v.* Greenback, 2 Marsh. 485. Morrill *v.* Aden, 19 Vt. 505. Prescott *v.* Norris, 32 N. H. 101.

(*a*) Mills *v.* Graham, 1 B. & P., N. R. 145.

(*b*) Bristow *v.* Eastman, 1 Esp. 172. An infant is liable in an action of trover for money stolen; or the tort may be waived and an action of assumpsit maintained against him for such money, or for the proceeds of stolen property converted into money. Shaw *v.* Coffin, 38 Me. 254. Elwell *v.* Martin, 32 Vt. 217.

(*c*) 2 Inst. 301.

charged. Where, therefore, trees, coals, or minerals wrongfully severed by one man from the soil and freehold of another, have been sold by the wrong-doer, and the latter dies, his estate, in the hands of his executor, is answerable for the price, and an action for money had and received may be maintained against the executor for the recovery thereof(*d*).

Personal representatives are not responsible for a conversion or unlawful detention by their testator or intestate in his lifetime of another man's chattels, the private wrong being, as we have seen, buried with the offender. But where there has been a conversion of property by the deceased, which has benefited his personal estate, the personal representative may, in general, be sued in form *ex contractu*, founded on the tort. "Thus an action on the custom of the realm against a common carrier for not receiving and carrying goods, being for a tort, will not lie against an executor; but an action *ex contractu* for the same will lie. If a man take a horse from another, and bring him back again, an action for trespass will not lie against his executor, but an action for the use and hire of the horse by the deceased may be maintained"(*e*). Where the plaintiff declared that he was possessed of a cow which he delivered to the testator to keep for him, and that the testator sold the cow, and converted and disposed of the money to his own use, it was held that the executor was not responsible in trover for the conversion of the beast by the testator, but that he might be made liable for the value of it in an action for money had and received(*f*).

No action lies against an executor of a deceased sheriff, gaoler, or officer, for an escape suffered or permitted by his testator, or by reason of his testator's having neglected to attend and give evidence in a cause in obedience to a subpœna served upon him in his lifetime(*g*), nor are executors liable in equity for the negligence of their testator(*h*).

1316 *Wrongs committed by a deceased person within six months before death.*—By 3 & 4 Wm. 4, c. 42, s. 2, reciting that there was no remedy provided by law for certain wrongs done by a person deceased in his lifetime to another in respect of his property, real or personal, it is enacted, that an action of trespass or case may be maintained against the executors or administrators of any person deceased, for any wrong

(*d*) Powell *v.* Rees, 7 Ad. & E. 428.
(*e*) Hambly *v.* Trott, Cowp. 375.
(*f*) Bailey *v.* Birtles, Sir T. Raym. 71. Perkinson *v.* Gilford, Cro. Car. 539.
(*g*) Williams on Executors, 6th ed., pt. 4, bk. 2.
(*h*) Overend & Co. *v.* Gurney, L. R., 4 Ch. App. 701.

committed by him in his lifetime to another in respect of his property, real or personal, so as such injury shall have been committed within six calendar months before such person's death; and so as such action shall be brought within six calendar months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person; and the damage to be recovered in such actions shall be payable in like order of administration as the simple contract debts of such person. Where a watch was shown to have been in the possession of a testatrix more than six months before her decease, and she was asked within the six months to give it up, and wrongfully refused, this was held to be evidence of a conversion within six months of her death(*i*).

1317 *Actions against the executor of a prebendary, vicar, or incumbent of a benefice* for dilapidations are maintainable where the prebendal-house, chancel of the church (where that is repairable by the incumbent), or the buildings, hedges and fences belonging to the prebendary, vicarage, or benefice are left in a state of decay, or where there has been a felling of timber otherwise than for repairs or fuel(*k*); but the incumbent of a vicarage cannot maintain an action against the executor of his predecessor for not cultivating the glebe-land in a husband-like manner(*l*). And in the case of dilapidations to *buildings*, no claim for dilapidations can now be made, except under the provisions of the Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43), except in the case of wilful waste. See *ante*, pp. 289, 290.

1318 *Liabilities of executors and administrators for their own wrongful acts.*—If a testator or intestate at the time of his death was in the possession of the goods and chattels of third persons, and had no lien upon them, and these goods come into the possession of his personal representatives after his decease, or under their dominion and control, and they refuse to give them up to the owners on demand made by the latter, they are responsible in damages for a conversion or unlawful detention of the property. But those only who have been guilty of the tort should be made defendants. Thus, if there are three executors, and one only of the three has got possession of, or meddled with, the goods of the plaintiff, that one alone should be sued.

Formerly, if an executor committed a devastavit and died, the wrong died with him, so that his executor was not liable for it; but by

(*i*) Richmond *v.* Nicholson, 8 Sc. 137.
(*k*) Radcliff *v.* D'Oyly, 2 T. R. 630. Wise *v.* Metcalfe, 10 B. & C. 312; 1 Saund. 216a, note *a*.
(*l*) Bird *v.* Relph, 4 B. & Ad. 830.

30 Car. 2, c. 7, and 4 & 5 W. & M. c. 34, s. 12, the executors or administrators of any executor or administrator, who shall waste or convert to his own use the estate of his testator or intestate, shall be liable in the same manner as their testator or intestate would have been if they had been living(*m*). A feme covert executrix who survives her husband is liable for any devastavit committed by him during their joint lives(*n*).

An executor is as liable for what he omits to do, if it is his duty to do it, as for a misfeasance(*o*).

1319 *Trustees in bankruptcy.*—Trustees of the estate and effects of bankrupts may defend any action or suit which the bankrupt might have defended (*ante*, p. 1112). They are not liable as assignees of a lease unless they have done some act which unequivocally indicates that they have elected to take the lease(*p*); nor even then, unless they have refused for twenty-eight days after notice, or such further time as the court may allow, to disclaim the lease. See *ante*, p. 424.

1320 *Of the continued liability of a bankrupt to actions ex delicto, and to arrest.*—The Bankrupt Act does not exempt a bankrupt from actions for damages in respect of wrongs done by him prior to, or during the bankruptcy, for the damages do not constitute a debt until they have been assessed by a jury, and judgment for them has been obtained(*q*). If the action has been tried and damages recovered before the granting the order of discharge, so that the amount has become a judgment debt provable against the estate, then the order of discharge will be a bar to further proceedings thereon(*r*). The 31st section of the 32 & 33 Vict. c. 71, enacts that "demands in the nature of unliquidated damages, otherwise than by reason of a contract or promise, shall not be provable in bankruptcy."

Arrest and imprisonment for debt have been abolished, with a few exceptions, by 32 & 33 Vict. c. 62(*s*). The second part of that Act, however, sect. 11 to 23, provides for the punishment of certain misdemeanors committed by bankrupts, and the 9th section provides that nothing in the first part of the Act, sect. 1 to 10, shall affect any right or power under the 32 & 33 Vict. c. 71 (the Bankruptcy Act, 1869), to

(*m*) See Coward *v.* Gregory, L. R., 2 C. P. 153.
(*n*) Soady *v.* Turnbull, L. R., 1 Ch. App. 494.
(*o*) Grayburn *v.* Clarkson, L. R., 3 Ch. App. 605.
(*p*) See Goodwin *v.* Noble, 8 Ell. & Bl. 587; 27 Law J., Q. B. 204.
(*q*) Lloyd *v.* Peell, 3 B. & Ald. 408. Parker *v.* Crole, 5 Bing. 63. Parker *v.* Norton, 6 T. R. 699.
(*r*) Longford *v.* Ellis, 1 H. Bl. 29, n. Greenway *v.* Fisher, 7 B & C. 436.
(*s*) See R. *v.* Master, L. R., 4 Q. B. 285.

arrest or imprison any person. The last-mentioned Act, sect. 86, provides that a debtor may be arrested, and his goods, papers, etc., seized, if, after a petition of bankruptcy has been presented, there is reason to believe he is going abroad, or quitting his residence, to avoid service of the petition, examination in bankruptcy, etc., or if he is about to remove or conceal his property, etc., or if he removes any property without leave of the trustee in bankruptcy, or fails to attend any examination(*t*); and the 33 & 34 Vict. c. 76, extends the power of arrest to cases where a debtor summons has issued, but *before* any petition for adjudication has been presented.

1321 *Of the number of the defendants in actions ex delicto—Parties jointly and severally liable.*—Whoever wilfully assists in the doing of an unlawful act becomes answerable for all the consequences of such act; and when several persons have been jointly concerned in the commission of a wrongful act, they may in general, as we have seen, all be charged jointly as principals, or the plaintiff may sue any of the parties upon whom individually a separate trespass attaches(*u*).

Torts are in their nature several, and in all actions of tort, therefore, one defendant may be acquitted and others found guilty.

In the case of actions for the wrongful conversion of property, several parties may be joined as defendants, and one or more of them be found guilty and the rest acquitted; and unless all are implicated in a joint conversion, all cannot be found guilty(*x*). But where the action, though for a tort, is founded on a contract, and several defendants are sued jointly, it has been doubted whether one can be acquitted and another found guilty(*y*). Where an action was brought against two defendants for deceit, alleged to have been committed in a joint sale by them of some sheep, and the declaration set forth that the defendants sold to the plaintiff some sheep, their joint property, and warranted them to be sound, and they proved to be unsound, and there was no evidence to affect one of the defendants, it was held that the action was founded on the joint contract of both, and that one defendant could not be acquitted and the other found guilty(*z*). See *post*, s. 3.

Where an action has been brought against several joint-trespassers, the evidence must be confined to the joint offence in which all are im-

(*t*) And see s. 77.

(*u*) Ld. Kenyon, C.J., Mitchell *v.* Tarbutt, 5 T. R. 651. Sutton *v.* Clarke, 6 Taunt. 29. Creed *v.* Hartmann, 29 N. Y. 591. Low *v.* Mumford, 14 Johns. 426. Hair *v.* Little, 28 Ala. 236.

(*x*) Nicoll *v.* Glennie, 1 M. & S. 588.

(*y*) Pozzi *v.* Shipton, 8 Ad. & E. 975.

(*z*) Weall *v.* King, 12 East, 452.

plicated. The plaintiff cannot recover for what was done by one or more before or after the joint act(*a*); and when an action is brought for one joint-trespass, and the plaintiff elects to go for a trespass committed at any particular time, he must confine himself to that period; and if all the defendants were not concerned in the trespass then committed, the plaintiff cannot have recourse to a trespass committed at a subsequent time, when some of the defendants were concerned who were not implicated in the first transaction(*b*), for some of the defendants might be thereby subjected to damages for a trespass, wherein they had no part or concern(*c*); but if he fails in proving a joint-trespass by all on the day he first selects, he is at liberty to abandon that trespass and to prove a joint-trespass at another period(*d*).

When the plaintiff's evidence discloses no joint-trespass committed by all the defendants, but only separate trespasses by each, the plaintiff may be put to his election against which of the several defendants he will proceed(*e*).

One of several partners cannot, as we have seen, drag the firm or his co-partners into a trespass by signing a warrant or authority for the doing a wrongful act in the name of the firm of which he is a member; for one partner has no authority to bind the partnership to the commission of a wrongful act without the previous consent or subsequent concurrence of all the partners(*f*). If the act is done by the one partner for the benefit of the firm, and the firm afterwards take advantage of the act, and adopt the transaction, they may then, as we have seen, become responsible for it.

SECTION III.

OF NON-JOINDER AND MIS-JOINDER OF PARTIES—AMENDMENT BEFORE AND AT THE TRIAL.

By the Common Law Procedure Act, 1860, 23 & 24 Vict. c. 126, s. 19, it is provided, that the joinder of too many plaintiffs shall not be fatal, but every action may be brought in the name of all the persons in

(*a*) Aaron *v.* Alexander, 3 Campb. 35. Higby *v.* Williams, 16 Johns. 215.
(*b*) Sedley *v.* Sutherland, 3 Esp. 204. See Guille *v.* Swan, 19 Johns. 381; Bard *v.* Yohn, 26 Penn. 482; Myrick *v.* Downer, 18 Vt. 360.
(*c*) Ibid. Tait *v.* Harris, 6 C. & P. 73.
(*d*) Roper *v.* Harper, 5 Sc. 250; 4 B. N. C. 20.
(*e*) Howard *v.* Newton, 2 M. & Rob. 510.
(*f*) Petrie *v.* Lamont, Car. & M. 96; 54 N. Y. 1.

whom the legal right may be supposed to exist, and judgment may be given in favor of such one or more of the plaintiffs as shall be adjudged by the court to be entitled to recover(*g*); but the defendant, though unsuccessful, is entitled to the costs occasioned by joining any person in whose favor judgment is not given, unless otherwise ordered by the court or judge. This section applies only to cases where there was fair ground to believe that there was a joint cause of action vested in all who were joined as plaintiffs. It does not enable two or more persons to join in a speculative sort of action, saying, one or other of us is entitled to recover, but not both(*h*). Nor does it enable the court to give judgment for one plaintiff, who might have been prevented from maintaining the action, if he had been the sole plaintiff at first(*i*).

1322 *Amendment of non-joinder and mis-joinder before trial.*—By the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, s. 34, it is enacted, that "it shall be lawful for the court or a judge, at any time before the trial of any cause, to order that any person not joined as plaintiff shall be so joined, or that any person originally joined as plaintiff shall be struck out, if it shall appear that injustice will not be done by such amendment, and that the person to be added consents, either in person or by writing under his hand, to be so joined, or that the person to be struck out was originally introduced without his consent, or that such person consents in manner aforesaid to be struck out; and such amendment shall be made upon such terms as to the amendment of the pleadings (if any), postponement of the trial, and otherwise, as the court or judge by whom such amendment is made shall think proper; and when any such amendment shall have been made, the liability of any person who shall have been added as co-plaintiff shall, subject to any terms imposed as aforesaid, be the same as if such person had been originally joined in such cause."

1323 *Amendment at the trial.*—It is further enacted, by s. 35, that in case it shall appear at the trial of any action that there has been a mis-joinder of plaintiffs, or that some person, not joined as plaintiff, ought to have been so joined, and the defendant shall not, at or before the time of pleading, have given notice in writing that he objects to such non-joinder, specifying therein the name or names of such person, such mis-joinder or non-joinder may be amended as

(*g*) Bremner v. Hull, L. R., 1 C. P. 748.
(*h*) Bellingham v. Clark, 1 B. & S. 332.
(*i*) Stubs v. Stubs, 31 Law J., Exch. 511.

a variance at the trial by any court of record holding plea in civil actions, and by any judge sitting at *nisi prius*, or other presiding officer, in like manner as in the case of amendments of variances under the 3 & 4 Wm. 4, c. 42, if it shall appear to such court, or judge, or other presiding officer, that such mis-joinder or non-joinder was not for the purpose of obtaining an undue advantage, and that the person to be added consents, either in person or by writing under his hand, to be so joined, or that the person to be struck out was originally introduced without his consent, or that such person consents in manner aforesaid to be so struck out; and such amendment shall be made upon such terms as the court, or judge, or other presiding officer by whom such amendment is made shall think proper; and when any such amendment shall have been made, the liability of any person who shall have been added as co-plaintiff shall, subject to any terms imposed as aforesaid, be the same as if such person had been originally joined in such action. And by s. 222, further powers of amendment (*post*, ch. 21, s. 2) are given, enabling fresh plaintiffs to be added in certain cases, in order to bring the real question in dispute before the court(*k*), but not a fresh defendant(*l*). The court will not add a party to the record as plaintiff if he is trustee for a person who objects to his being added(*m*). Nor can the court under s. 222, substitute the personal representative as plaintiff, if the plaintiff was dead at the time the writ was issued(*n*).

1324 *Amendment after notice or plea in abatement of non-joinder of parties.*—It is also enacted, by s. 36, that in case notice of non-joinder be given, or any plea in abatement of non-joinder of a person as co-plaintiff, in cases where such plea in abatement may be pleaded, be pleaded by the defendant, the plaintiff shall be at liberty, without any order, to amend the writ and other proceedings before plea, by adding the name of the person named in such notice or plea in abatement, and proceed in the action without any further appearance, on payment of the costs occasioned by such amendment; and, in such case, the defendant shall be at liberty to plead *de novo*.

1325 *Mis-joinder of defendants.*—The 15 & 16 Vict. c. 76, s. 37, provides for the amendment of a mis-joinder of defendants at the trial by the judge "or other presiding officer." A county court judge therefore may, in an action sent down for trial under 19 & 20 Vict. c. 108, s. 26,

(*k*) Blake *v.* Done, 31 Law J., Exch. 102.
(*l*) Garrard *v.* Guibelei, 34 Law J., C. P. 131; 1b. 270.
(*m*) Sturgis *v.* Smith, 5 L. T. R., N. S. 586.
(*n*) Clay *v.* Oxford, L. R., 2 Exch. 54.

amend a mis-joinder of defendants under this section(*o*). The acquittal of one defendant in an action founded on neglect of duty and not upon breach of contract, does not affect the right of the plaintiff to have his judgment against the defendant against whom the verdict has been obtained(*p*).

1326 *The effect of marriage, death, and bankruptcy upon the proceedings in an action* is provided for and regulated by the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, ss. 135–142. The right of a personal representative of a deceased plaintiff to continue the action by entering a suggestion of the death upon the record (s. 137), applies only to such causes of action as would have survived to the personal representative, and not where the cause of action died with the plaintiff at common law, and a perfectly new right has by statute been given to the personal representative, as under Lord Campbell's Act, 9 & 10 Vict. c. 93(*q*).

(*o*) Rennison *v.* Walker, L. R., 7 Exch. 143.
(*p*) Govett *v.* Radnidge, 3 East, 62.
(*q*) Flinn *v.* Perkins, 33 Law J., Q. B. 10.

CHAPTER XXI.

OF ACTIONS EX DELICTO, PLEADINGS, DEFENCES, AND EVIDENCE.

SECTION I.—*Pleadings and defences in actions ex delicto.*—Of actions in the county court—Jurisdiction of the county court—Waiver of objection to jurisdiction—Actions in the superior courts—Joinder of different causes of action—Requisites of the declaration—Statement of special damage—Several counts in declarations—Pleas to the jurisdiction—What matters must be specially pleaded—Pleading several matters of defence—Traverses—Requisites of special pleas—Fictitious and needless averments—Defences arising after the commencement of the action—Payment of money into court—Pleas of infancy, accord and satisfaction, pendency of another action for the same cause, judgment recovered, bankruptcy, statutes of limitations—Equitable defences—Joinder of issue—New assignments—Demurrers.

SECTION II.—*Proceedings and evidence at the trial.*—Right to begin—Proof by plaintiff—Effect of payment of money into court—Primary and secondary evidence—When a copy may be received as primary evidence—Notice to produce to let in secondary evidence—Where notice to produce is unnecessary—Evidence of admissions of liability—Proof of facts resting on hearsay and reputation—Declarations of deceased persons—Entries in books—Statements and declarations forming part of the *res gesta*—When a party is estopped from contradicting his own representations—Evidence of manorial customs, of title, seisin, etc.—Amendment of variances—Admissions—Illness of witness.

SECTION I.

OF PLEADINGS, DEFENCES, AND EVIDENCE IN ACTIONS EX DELICTO.

1327 *Of actions in the county court*(a).—The 30 & 31 Vict. c. 142, enacts (s. 1), that a plaint may be entered in the county court within the district of which the defendant or one of the defendants dwells or carries on his business at the time of bringing the action or suit, or,

(a) See Pollock's County Court Practice, 6th ed. (1868).

by leave of the judge or registrar, within which he dwelt or carried on business within six months of the time of commencing the action, or, by the like leave, within which the cause of action wholly or in part arose(*b*). It has been held(*c*) that a railway company neither "carries on its business," nor "dwells," within the district of every county court where it may happen to have a station, but that it must be considered to "carry on its business," and to "dwell," at its head quarters, *i.e.*, at the place where its principal office is situate, where the directors meet, and where all the affairs of the company are managed and directed(*d*). But in the case of a manufacturing company, they carry on business where the goods are manufactured and sold, although the registered office of the company where the board of directors meet, may be elsewhere(*e*). If the company merely receives tolls elsewhere than at its registered office, as in the case of a bridge company, its registered office would probably be its place of business within the above section(*f*). A commercial company established in the metropolis, and carrying on business there, does not also carry on business in a country town merely by employing an agent there and transacting business there in the name of such agent and not in their own names(*g*). A man who has no permanent residence "dwells" wherever he is temporarily resident(*h*).

A party injured by the wrongful act of the company may also sue them in the district where the cause of action wholly or in part arose, by making application to the registrar, or by obtaining the leave of the judge of the county court of that district, 30 & 31 Vict. c. 142, s. 1. Under the repealed 16th section of the 9 & 10 Vict. c. 95, the action could only be brought in the district where the cause of action, *i.e.*, the whole cause of action, arose, that is to say, everything which it was necessary for the plaintiff to prove as a condition precedent to his right to recover(*i*).

1328 *The general jurisdiction of the county court* extends to all actions *ex delicto* for the recovery of demands not exceeding 50*l*; 13 & 14 Vict.

(*b*) As to county court actions in London, see s. 3.

(*c*) Under the repealed sections of the 9 & 10 Vict. c. 95.

(*d*) Shiels *v.* Gt. North. Rail. Co., 30 Law J., Q. B. 331. Adams *v.* Gt. West. Rail. Co., 30 Law J., Exch. 124. Brown *v.* Lond. & North-West. Rail. Co., 32 Law J., Q. B. 318.

(*e*) Keynsham Blue Lias Co. *v.* Baker, 33 Law J., Exch. 41.

(*f*) Aberystwith Pier Co. *v.* Cooper, 35 Law J., Q. B. 44.

(*g*) Corbett *v.* Gen. Steam Nav. Co., 4 H. & N. 482. Minor *v.* Lond. & North-West. R. Co., 1 C. B., N. S. 331. Oldham Bridge Co., *v.* Heald, 33 Law J., Exch. 236.

(*h*) Alexander *v.* Jones, L. R., 1 Exch. 133.

(*i*) Fuller *v.* Mackay, 23 Law J., Q. B. 415. Aris *v.* Orchard, 6 H. & N. 160; 30 Law J., Exch. 21. See Bonsey *v.* Wordsworth, 18 C. B. 325.

c. 61 s. 1, except actions for malicious prosecution, libel, slander, or seduction; 9 & 10 Vict. c. 95, s. 58. But by the 30 & 31 Vict. c. 142, s. 10, any action "for malicious prosecution, illegal arrest, illegal distress, assault, false imprisonment, libel, slander, seduction, or other action of tort," brought in a superior court, may be remitted for trial to a county court(*j*), unless the plaintiff gives security for costs to the satisfaction of a master, or satisfies the judge that he has a cause of action fit to be prosecuted in the superior court(*k*). The substance, and not the form of the cause of action, must be regarded in order to determine whether it is one of the exceptioned actions. If, therefore, a plaint in the county court is in form founded on negligence, but is in substance a plaint for a malicious prosecution, the county court has no jurisdiction to hear and determine it(*l*); unless it be remitted for trial under the above provision. The signing of the charge-sheet at a police station is not necessarily the commencement of a malicious prosecution, at all events if the plaintiff is discharged when taken before the magistrates, and there is nothing to prevent him from suing in the county court for false imprisonment only, although he may have appeared before the magistrate to support the charge(*m*).

1329 *Copyright of designs.*—The proprietor of copyright in any design may institute proceedings in the county court of the district in which the piracy is alleged to have been committed, for the recovery of the damages he has sustained by reason of such piracy; but in any such proceedings the plaintiff must deliver with his plaint a statement of particulars as to the date and title, or other description of the registration of the copyright, and of the alleged piracy; and the defendant must give notice of any objections to the copyright, or to the title of the proprietor, in manner therein provided(*n*).

1330 *Friendly Societies.*—Applications for the settlement of disputes arising in friendly societies, the rules of which do not prescribe any other mode of settling such disputes, may be made to the county court of the district within which the usual(*o*) *or* principal place of business of the society is situate, and the court is to give such relief and make

(*j*) See Thornewell *v.* Wigner, L. R., 6 Exch. 87.

(*k*) See Owens *v.* Woosman, Owens *v.* Jones, L. R., 3 Q. B. 469; 37 Law J., Q. B. 159. Kimbray *v.* Draper, L. R., 3 Q. B. 160; 37 Law J., Q. B. 80.

(*l*) Hunt *v.* North Staff., etc., Rail. Co., 2 H. & N. 451. Rogers *v.* Macnamara, 14 C. B. 27; *post*, ch. 22.

(*m*) Austin *v.* Dowling, L. R., 5 C. P. 534.

(*n*) 21 & 22 Vict. c. 70, s. 8. As to proceedings in appeal or prohibition, see s. 9.

(*o*) See Shea *v.* United Assurance Soc., L. R., 3 C. P. 21.

such orders as might be made by the Court of Chancery(*p*). And it has been held that the county court has jurisdiction to reinstate a member of an enrolled friendly society improperly expelled, although the rules of the society prescribe a mode of determining disputes under them(*q*).

1331 *Ouster of jurisdiction of county court in cases where the title to land, etc., is in question.*—The 58th section of the 9 & 10 Vict. c. 95, further excepted from the cognizance of the county court actions "of ejectment, or in which the title to any corporeal or incorporeal hereditaments, or to any toll, fair, market, or franchise shall be in question"(*r*). But the 30 & 31 Vict. c. 142, ss. 11, 12, now provides, that actions of ejectment where neither the value of the land, etc., nor the rent payable for it, shall exceed 20*l*., may be brought in the county court of the district in which the lands are situate. The value of the land under the above section means the value of the land let by the owner not the value of the plaintiff's interest in the land, as where he is himself a lessee under the ground landlord, and sub-lets(*s*). But the rent payable means the rent payable between the litigant parties(*t*). If the title to be tried affects other lands of greater value than 20*l*., the action may, by order of a judge, be tried in the superior court (s. 12).

The exception of actions in which the title to any corporeal or incorporeal hereditament, toll, fair, market, or franchise comes in question, it will be observed, still remains. The mere assertion, however, of a *bonâ fide* claim of title by a party to the action is not sufficient to oust the jurisdiction of the county court. It must be shown that the title to land really "is in question"(*u*); and if it really comes in question, it is immaterial whether it is brought forward *malâ fide* or *bonâ fide*(*v*). If a plaintiff shapes his case so as to show by his plaint, or the particulars of demand thereunto annexed, that the title to land, etc., comes into question, he then ousts the court of its jurisdiction; but if the plaintiff proceeds for a matter which is *primâ facie* within the jurisdiction of the county court, a mere allegation or notice by the defendant that the title is in question, or a plea setting up title, etc.,

(*p*) 18 & 19 Vict. c. 63, ss. 41, 42, 44.
(*q*) Wooldridge, *ex parte*, 31 Law J., Q. B. 122. See Skipton Industrial Co-operative Soc. *v.* Prince, 33 ib. 323.
(*r*) Lawford *v.* Partridge, 1 H. & N. 621.
(*s*) Elston *v.* Rose, L. R., 4 Q. B. 4.
(*t*) Brown *v.* Cocking, L. R., 3 Q. B. 672.
(*u*) Emery, *In re*, 2 C. B., N. S. 423; 27 Law J., C. P. 216.
(*v*) Marsh *v.* Dewes, 17 Jur. 558.

is not sufficient to oust the jurisdiction of the court(*w*). Proof of the facts stated or pleaded must in the first instance be given, that the judge may inquire into them, and determine whether the title really is in question. But he cannot by his own decision give himself jurisdiction, and if he comes to a wrong judgment, and improperly assumes jurisdiction, a prohibition will lie(*x*), and he and his officers will be responsible for their proceedings. The judge must of necessity determine the question of his jurisdiction for himself in the first instance, because on that determination it depends whether he hears the case on the merits(*y*).

It was held that title to a corporeal hereditament came into question in the following cases: where the plaint was for breaking and entering certain apartments of the plaintiff, removing the furniture and expelling the plaintiff, and the plaintiff's case was that he had let the defendant a portion of the cottage, retaining the rest with the furniture for himself; that the defendant broke and entered this (the plaintiff's) part of the cottage, and removed the furniture into a neighboring shed, affirming that he had taken the whole cottage and would keep it(*z*); where the plaint was for a year's rent of a house let by the plaintiff to the defendant, and the defence was that the plaintiff's title expired subsequently to the letting, and was then vested in another party, who claimed the rent, and it appeared that it was a *bonâ fide* defence with some evidence to support it, and not a mere illusory matter set up for the mere purpose of ousting the jurisdiction of the court(*a*); where, on a claim for rent, the defendant set up a *bonâ fide* claim of ownership subject to a quit rent(*b*).

Where an action for false imprisonment was brought against the defendant for giving the plaintiff into custody for trespassing on his close and taking sand therefrom, and a question was raised as to the right to take sand from the close, it was held that this right was not involved in the inquiry into the question of the false imprisonment, as it might have been if the action had been brought for a trespass upon the land, or for a trespass in removing the plaintiff from the land, and the defendant had justified under a plea of *molliter manus imposuit*(*c*).

It is to be observed, also, that the 58th section of the 9 & 10 Vict.

(*w*) Lilley *v.* Harvey, 5 D. & L. 648.
(*x*) Elston *v.* Rose, *supra*.
(*y*) Thompson *v.* Ingham, 14 Q. B. 718; 19 Law J., Q. B. 189. Brown *v.* Cocking, *supra*.
(*z*) Chew *v.* Holroyd, 8 Exch. 249; 22 Law J., Exch. 95.
(*a*) Mountnoy *v.* Collier, 1 Ell. & Bl. 630; 22 Law J., Q. B. 124.
(*b*) Pearson *v.* Glazebrook, L. R., 3 Exch. 27.
(*c*) Eversfield *v.* Newman, 4 C. B., N. S. 418.

c. 95 does not extend to oust the jurisdiction of the county court in cases where a new remedy has been expressly given in the county court by a subsequent statute. Thus, where an Act(*d*) provided, that the amount paid for carrying into force an order of two justices to abate a nuisance might be recovered in the county court from the owner of the premises where the nuisance existed, and a plaint was brought in the county court charging the defendant with certain expenses as being the owner of a ditch, and the defence was, that the defendant was not the owner of the ditch, it was held that the title certainly did come in question on this issue, but that the particular statute on which the action was founded gave a special jurisdiction to the county court over the particular question, and gave it express power to try the question of ownership, which necessarily involved the question of title(*e*).

1332 *Recovery of possession of small tenements in the county court.*—When the term and interest of any tenant of premises, the rent of which does not exceed 50*l.* a-year, and upon which no fine or premium has been paid, has expired or been determined by notice to quit, and the tenant, or any person claiming under him, neglects or refuses to deliver up possession, the landlord may, by plaint in the county court of the district in which the premises lie, proceed for the recovery of such premises, adding a claim for rent and mesne profits, etc.(*f*). He may proceed also in such cases to recover possession by plaint in the county court where he has a right to re-enter for non-payment of rent(*g*). No question of title arises in the case of a landlord proceeding to recover possession of premises demised by him to a tenant, as both the tenant, and all persons claiming under the tenant, are estopped from disputing the landlord's title. If, therefore, the tenant voluntarily lets another person into possession, the person so let in is in the same position as the tenant himself, and is bound by the estoppel(*h*). But the tenant, and those claiming under him, may show that the title which the landlord had at the time of the demise subsequently expired, or was determined; and if such a point comes in question before the county court judge, there is, then, as we have

(*d*) 11 & 12 Vict. c. 123, which is repealed by 29 & 30 Vict. c. 90. The latter Act, however, s. 34, and the 18 & 19 Vict. c. 121, s. 19, substantially make similar provisions.

(*e*) Reg. *v.* Harden, 2 Ell. & Bl. 191; 22 Law J., Q. B. 299.

(*f*) 19 & 20 Vict. c. 108, ss. 50, 51. See Harrington (Earl) *v.* Ramsay, 22 Law J., Exch. 326. An order for delivery of possession, however, made under these sections does not affect the rights of a person not a party to the proceedings. Hodson *v.* Walker, L. R., 7 Exch. 55.

(*g*) 19 & 20 Vict. c. 108, s. 53.

(*h*) Emery, *In re*, 4 C. B., N. S. 423.

seen, a question of title ousting the jurisdiction of the court(*i*). And to give the county court jurisdiction, it must be established that the relationship of landlord and tenant exists between the parties(*j*).

1333 *Equitable jurisdiction.*—The 58th section of the 9 & 10 Vict. c. 95, further excepted from the jurisdiction of the county court any action "in which the validity of any devise, bequest, or limitation under any will or settlement may be disputed." But, by the 28 & 29 Vict. c. 99, s. 1, the county court may, in cases where the subject-matter of the suit does not exceed 500*l.*, exercise the jurisdiction of the Court of Chancery in administration suits, in suits for the execution of trusts(*k*), of foreclosure or redemption, for enforcing any charge or lien, for specific performance, or reforming or setting aside agreements(*l*), in proceedings under the Trustee Relief Acts, in all proceedings relating to the maintenance or advancement of infants, or for the dissolution of partnerships, "in all proceedings for orders in the nature of injunctions where the same are requisite for granting relief in any matter in which jurisdiction is given by this Act to the county court," and for stay of proceedings at law for debts provable under an administration suit then pending in such court; also by 31 & 32 Vict. c. 40, s. 12, in partition suits. Provision is also made by ss. 3 and 9 of 28 & 29 Vict. c. 99, and 30 & 31 Vict. c. 142, s. 9, for the transfer of suits from the county court to the Court of Chancery, and *vice versâ*, either at the discretion of a vice-chancellor, or by order of the judge of the county court or vice-chancellor, whenever it appears during the progress of the suit that the subject-matter exceeds or does not exceed 500*l.*, as the case may be(*m*); by s. 18 of the 28 & 29 Vict. c. 99, for an appeal from the decision of the county court to a vice-chancellor(*n*), and by ss. 10 and 11 for the determination of the particular court in which proceedings in equity must be taken or prosecuted under the Act.

1334 *Admiralty jurisdiction.*—By the 31 & 32 Vict. c. 71, jurisdiction in admiralty cases is given to certain county courts (designated by order in council) over claims for salvage(*o*), towage, necessaries(*p*), or wages, subject in each case to the limitation of amount specified in the Act, and also "as to any claim for damage to cargo or damage by collision

(*i*) Mountnoy *v.* Collier, *ante*, p. 1141.
(*j*) Banks *v.* Rebbeck, 20 Law J., Q. B. 476.
(*k*) Clayton *v.* Renton, L. R., 4 Eq. Ca. 158.
(*l*) 30 & 31 Vict. c. 142, s. 9, and sched. C. Wilcox *v.* Marshall, L. R., 3 Eq. Ca. 270.
(*m*) See Baker *v.* Walt, L. R., 9 Eq. Ca. 103. Birks *v.* Silverwood, L. R., 14 Eq. Ca. 101.
(*n*) See Harper *v.* Pole, L. R., 3 Eq. Ca. 752; 30 & 31 Vict. c. 142, s. 25.
(*o*) The county court had previously exercised a limited jurisdiction in salvage cases. See 25 & 26 Vict. c. 63, s. 49; 17 & 18 Vict. c. 104, ss. 458, 460.
(*p*) See The Riga, L. R., 3 Adm. & Eccl. 518.

—in which the amount claimed does not exceed three hundred pounds," s. 3. And by the 32 & 33 Vict. c. 51, s. 2, "as to any claim in tort in respect of goods carried in any ship"(*q*) subject to a similar limitation as to amount, which jurisdiction may be exercised by proceedings either *in rem* or *in personam*, s. 3. By the 4th section of that Act it is enacted that the above 3rd section of the 31 & 32 Vict. c. 71, shall extend to all claims to damage to *ships*, whether by collision or otherwise, when the amount claimed does not exceed 300*l*. It had been previously held (under 3 & 4 Vict. c. 65), that the jurisdiction of the Court of Admiralty does not extend to barges propelled by oars only(*r*), and the same construction has now been put upon the above Acts conferring admiralty jurisdiction upon the county courts(*s*). By ss. 6, 7, and 8, of the first-mentioned Act, provision is made for the transfer of causes from the county court to the High Court of Admiralty(*t*), or to another county court, according to circumstances, by s. 10 and s. 5 of 32 & 33 Vict. c. 51, for the summoning of nautical assessors, in any admiralty or maritime cause, to assist the judge; by s. 21 of the former Act for the determination of the particular county court in which proceedings should be commenced, and by s. 26 of that Act for an appeal to the High Court of Admiralty from the decree or order of the county court(*u*). If less than the sum to which the jurisdiction of the county is limited, *i.e.* 300*l*., in actions of tort, is "recovered" in a superior court(*v*), the plaintiff is not entitled to costs(*w*).

1335 *Jurisdiction by consent.*—By 19 & 20 Vict. c. 108, s. 23, it is further enacted, that with respect to all actions other than for crim. con. (now abolished), which may be brought in any superior court of common law, if both parties shall agree by memorandum signed by them or their respective attorneys, that any county court named in such memorandum shall have power to try such action, such county court shall have jurisdiction to try the same. And (s. 25) that in any action in the county court in which the title to any corporeal or incorporeal hereditament, or to any toll, fair, market, or franchise shall incidentally come in question, the judge shall have power to decide the claim,

(*q*) See The Nuova Raffaelina, L. R., 3 Adm. & Eccl. 483.
(*r*) The Bilbao, 2 Lush. 149.
(*s*) Everard *v.* Kendall, L. R., 5 C. P. 428. See The Dowse, L. R., 3 Adm. & Eccl. 135; Simpson *v.* Blues, L. R., 7 C. P. 290.
(*t*) See The Bengal, L. R., 3 Adm. & Eccl. 14; The Swan, ibid. 314.
(*u*) See The Forest Queen, L. R., 3 Adm. & Eccl. 299.
(*v*) See Hewitt *v.* Cory, L. R., 5 Q. B. 418.
(*w*) 31 & 32 Vict. c. 71, s. 9.

which it is the immediate object of the action to enforce, if both parties at the hearing consent in writing, signed by them or their attorneys; but the judgment of the court in such cases is not to be evidence of title between the parties or their privies in any other proceeding; and the consent is not to affect any right of appeal.

A similar consensual jurisdiction is by the 31 & 32 Vict. c. 71, s. 3, and 32 & 33 Vict. c. 51, s. 2, given to the county court in Admiralty causes, where the sum claimed exceeds the amount to which their ordinary jurisdiction is limited. But no such consensual jurisdiction is given to them in equity.

1336 *Waiver of objection to jurisdiction.*—When parties appear before a judge and submit their case to his determination, and make no objection to his jurisdiction until after he has adjudicated, they are often bound by his determination because they have assented to it(*x*). Where a judge made an order under the Interpleader Act which the Act gave him no power or authority to make without the consent of the parties, and there was no express formal consent, but both the plaintiff and defendant attended the hearing of the summons before the judge, and took no objection to the making of the order, it was held that they must by their conduct be taken to have submitted the matter to his decision, and that the order was binding and conclusive upon them as an award between them. It was held, also, that as the order was the order of a superior court, the consent which was necessary to give jurisdiction need not be stated on the face of the order, as it would be intended that the court had jurisdiction(*y*); for nothing shall be intended to be out of the jurisdiction of the superior court but what expressly appears to be so(*z*).

So, where the 17 & 18 Vict. c. 125, s. 1, gave jurisdiction to a judge to try issues of fact without a jury, in case the parties consented in writing, and the court or a judge allowed such trial, and the parties to an action verbally consented to try issues of fact before a judge without a jury, and both parties appeared, and the case was heard and decided, it was held that they could not object to his jurisdiction on the ground that there had been no consent in writing, nor any order of the court, or a judge, allowing such trial as required by the Act, but that both parties were estopped by their conduct from taking the objection(*a*).

(*x*) Murish *v.* Murray, 13 M. & W. 56. *Ex parte* Michael, L. R., 7 Q. B. 658.
(*y*) Harrison *v.* Wright, 13 M. & W. 816.
(*z*) Peacock *v.* Bell, 1 Wms. Saund. 74a.
(*a*) Andrews *v.* Elliott, 25 Law J., Q. B. 1.

Where a party against whom costs have been given by a Court of Quarter Sessions consents that the taxation shall take place after the sessions are over, and the justices give judgment for costs *nunc pro tunc*, the party so consenting is precluded from afterwards objecting to the want of jurisdiction(*b*).

But where the objection is that the person adjudicating has no power or jurisdiction over the matter in controversy(*c*), *e.g.*, that an arbitrator has not duly enlarged the time for making his award, by which his authority is determined(*d*), the attendance of the complainant and his taking part in the proceedings will not preclude him from subsequently raising the objection; although if the objection be that some bare formality has not been observed, that will be waived if the parties are substantially before the right tribunal, and the person who raises the objection takes part in the proceedings, although under protest, intending to avail himself of the decision if in his favor, and to object to it if against him(*e*).

1337 *Of actions in the superior courts—Joinder of different causes of action in the same suit.*—By the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, it is enacted (s. 3), that it shall not be necessary to mention any form or cause of action in any writ of summons; and (s. 41) that causes of action, of whatever kind, provided they be by and against the same parties and in the same rights, may be joined in the same suit, except replevin or ejectment; and where two or more of the causes of action so joined are local, and arise in different counties, the venue may be laid in either of such counties; but the court, or a judge, has power to prevent the trial of different causes of action together, if such trial would be inexpedient, and may order separate records to be made up, and separate trials to be had; also (s. 40), that in any action brought by a man and his wife for an injury done to the wife, in respect to which she is necessarily joined as co-plaintiff, it shall be lawful for the husband to add thereto claims in his own right.

1338 *Requisites of the declaration.*—Every declaration of the cause of action must be entitled of the court in which the action is brought, and of the day of the month and year when it is pleaded, and must bear no other time or date(*g*). It must have a certain formal commencement and

(*b*) Freeman *v.* Read, 30 Law J., M. C. 123.
(*c*) Davies *v.* Price, 34 Law J., Q. B. 8.
(*d*) Ringland *v.* Lowndes, 33 Law J., C. P. 337.
(*e*) Ringland *v.* Lowndes, 33 Law J., C. P. 26.
(*g*) 15 & 16 Vict. c. 76, s. 54.

conclusion, and the name of the county from which the jury are to come to try the action is in all cases to be stated in the margin of the declaration, and taken to be the venue intended by the plaintiff, and no venue is to be stated in the body of the declaration, or in any subsequent pleading; but wherever local description is required, such local description is to be given(*h*), and the cause of action must be proved to have arisen at the particular place named: but where local description is not necessary, and the declaration does not allege that the injury was done in any particular locality, it is not necessary to prove the exact place where it was done(*i*).

The plaintiff is at liberty in all personal actions to lay his venue where he pleases, except in certain actions against justices, constables, officers, and their assistants(*k*), and the court will not make an order for changing the venue, unless there is manifest inconvenience or impropriety in trying the cause in the county selected by the plaintiff(*l*).

When the declaration is for a breach of duty, the facts creating the duty should be set forth on the face of the declaration. It is not enough to state that it was the duty of the defendant to do the act which he is stated to have neglected to do(*m*). "The decisions," observes Lord Campbell, "show that the allegation of duty in a declaration is in all cases immaterial, and ought never to be introduced, for if the particular facts set forth raise the duty, the allegation is unnecessary; and if they do not, it will be unavailing." If the particular facts stated in the declaration do not raise the duty, it cannot be established by other facts not stated. The declaration, therefore, must stand or fall by the facts stated(*n*). Negligence creates no cause of action unless it expresses or establishes some breach of duty(*o*).

The novelty of the particular complaint set forth in a declaration is no objection to it, provided it shows an injury cognizable by law(*p*).

1339 *Statement of special damage.*—If any peculiar or special damage has been sustained by the plaintiff, it should be stated in the declaration, with such reasonable particularity as to give notice to the defendant of the peculiar nature of the injury. Where the action is not maintainable at all without proof of special damage, then the fact of special

(*h*) 15 & 16 Vict. c. 76, ss. 59, 60. Reg. Gen. 16 Vict., 1 Ell. & Bl. App. lxxix.
(*i*) Simmons *v.* Lillystone, 8 Exch. 441; 22 Law J., Exch. 218.
(*k*) *Ante*, p. 709. And see Chitty's Arch. Pr., 12th edit., title, VENUE.
(*l*) Helliwell *v.* Hobson, 3 C. B., N. S. 761. See Levy *v.* Rice, L. R., 5 C. P. 119. Church *v.* Barnett, L. R., 6 C. P. 116.
(*m*) Brown *v.* Mallett, 5 C. B. 615.
(*n*) Seymour *v.* Maddox, 16 Q. B. 331.
(*o*) Dutton *v.* Powles, 30 Law J., Q. B. 169; 31 ib. Q. B. 191.
(*p*) Ashby *v.* White, 1 Smith's L. C., 6th ed., 227.

damage having been sustained cannot be given in evidence without a statement of it in the declaration; and in other actions, such as actions for words which are actionable in themselves, particular instances of special damage cannot be given in evidence, unless they are particularized in the declaration(*q*).

It is not necessary in a declaration by a plaintiff, who sues as the administrator of his deceased wife for an injury causing her death, under 9 & 10 Vict. c. 93, for his own benefit as husband, to disclose or allege any pecuniary damage suffered by the plaintiff beyond the ordinary claim for damages(*r*).

1340 *Several counts in declaration in respect of the same cause of action.*—By the rules and orders made by the judges pursuant to the Common Law Procedure Act, 1852, it is provided that, except as thereinafter mentioned, several counts on the same cause of action shall not be allowed, and any count or counts used in violation of the rule may on the application of the party objecting, within a reasonable time, or before an order made for time to plead, be struck out or amended by the court or a judge, on such terms as to costs or otherwise as such court or judge may think fit; but the court or judge may allow such counts on the same cause of action as may appear to be proper for the purpose of determining the real question in controversy between the parties on its merits, subject to such terms as to costs and otherwise as the court or judge may think fit. And when no rule or order has been made as to costs, and on the trial there is more than one count founded on the same cause of action, and the judge or presiding officer before whom the cause is tried shall, at the trial, certify to that effect on the record, the plaintiff will be liable for all costs occasioned by such count, in respect of which he has failed to establish a distinct cause of action, including those of the evidence as well as those of the pleading(*s*).

1341 *Pleas.*—All pleadings must be entitled of the court in which the action is brought, and must bear date the day of the month and year when they are pleaded(*t*).

1342 *Pleas to the jurisdiction—Privileges of ambassadors.*—The accredited ambassadors of foreign potentates resident in this country are not amenable to the jurisdiction of our civil tribunals. They cannot be lawfully imprisoned in any civil proceeding, nor can their goods be taken in execution; and if a writ is sued out against them, the defend-

(*q*) Browning *v.* Newman, 1 Str. 666; *ante*, p. 975.
(*r*) Chapman *v.* Rothwell, 27 Law J., Q. B. 315; *ante*, p. 519.
(*s*) Mercer *v.* Stanbury, 25 Law J., Exch. 316; 2 H. & N. 155, n.
(*t*) 15 & 16 Vict. c. 76.

ant may defeat the action by pleading to the jurisdiction of the court(*u*). In other cases, to repel the jurisdiction of the king's court, you must show a more proper and more sufficient jurisdiction, for if there is no other mode of trial that alone will give the king's courts a jurisdiction(*x*).

1343 *Plea of Not Guilty.*—In actions for a wrong or a breach of duty, the plea of not guilty operates, as we have seen, as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement, and no other defence than such denial is admissible under that plea. All other pleas in denial must take issue on some particular matter of fact alleged in the declaration(*y*). But where an action is brought against a master or employer for injuries sustained through the negligence of his servant or workman in doing his master's work, or executing his orders, the plea of not guilty puts in issue the fact whether the party doing the injury was the servant of the defendant, and whether he was doing his work or executing his orders(*z*). If several wrongful acts are alleged in the same declaration, the plea of not guilty puts them all in issue(*a*). Where special damage is substantially the thing complained of, as in actions for verbal slander, where the words spoken are not actionable *per se*, the plea of not guilty puts in issue the existence of the special damage(*b*).

1344 *Not guilty by statute.*—The 5 & 6 Vict. c. 97, s. 3, which repeals so much of any clause in any act of a local and personal nature whereby parties are entitled to plead the general issue, and give the special matters in evidence, is, by its preamble, confined to actions "for any matter done in pursuance of, or under the authority of, the said acts"(*c*).

1345 *Of pleading several matters of defence.*—By the new rules of pleading it is provided, that in all actions for torts, all matters in confession and avoidance of the cause of action shall be pleaded specially, as in actions on contract(*d*). The defendant may, by leave of the court or a judge, plead, in answer to the declaration or other subsequent pleading of the plaintiff, as many several matters as he shall think necessary for his defence, upon an affidavit made by him or his attorney, if required by

(*u*) Magdalena St. Nav. Co. *v.* Martin, 28 Law J., Q. B. 310.
(*x*) Ld. Mansfield, Mostyn *v.* Fabrigas, Cowp. 172.
(*y*) Reg. Gen. Hil. Term, 16 Vict. 1 Ell. & Bl. App. lxxxi.
(*z*) Mitchell *v.* Crassweller, 13 C. B. 245.
(*a*) Card *v.* Card, 5 C. B. 632.
(*b*) Wilby *v.* Elston, *ante*, p. 977.
(*c*) Carr *v.* Royal Ex. Ass. Co., 1 B. & S. 956; 31 Law J., Q. B. 98.
(*d*) Reg. Gen. Hil. Term, 16 Vict. 1 Ell. & Bl. App. lxxxi.

the court or judge, to the effect that he is advised or believes that he has just ground to traverse the several matters proposed to be traversed by him, and that the several matters sought to be pleaded are respectively true in substance and in fact. But the pleas of not guilty, release, statute of limitations, bankruptcy of the defendant, coverture, denial that the property, an injury to which is complained of, is the plaintiff's, leave and license, and *son assault demesne*, may be pleaded together as of course, without leave(*e*).

Except in cases specifically provided for, if either party plead several pleas, replications, avowries, cognizances, or other pleadings, without leave of the court or a judge, the opposite party is at liberty to sign judgment; which may, however, be set aside upon an affidavit of merits(*f*).

Several pleas, replications, or subsequent pleadings, or several avowries or cognizances, founded on the same ground of answer or defence, are not to be allowed, unless they appear to the court or judge to be proper for determining the real question in controversy between the parties on its merits, and subject to such terms as to costs and otherwise as the court or judge may think fit. When no rule or order has been made, and on the trial there is more than one plea, replication, or subsequent pleading on the record, founded on the same ground of answer or defence, and the judge or presiding officer, before whom the cause is tried, certifies to that effect on the record, the defendant will be liable for all costs occasioned by such plea or other pleading, in respect of which he has failed to establish a distinct ground of answer or defence, including those of the evidence as well as those of the pleading(*g*).

1346 *Traverses by the defendant.*—The defendant may either traverse generally such of the facts contained in the declaration as might have been denied by one plea, or may select and traverse separately any material allegation in the declaration, although it might have been included in a general traverse. He is at liberty also to traverse the whole or part of a replication or subsequent pleading of the plaintiff by a general denial, or, admitting some part or parts thereof, to deny all the rest, or to deny any one or more allegations(*h*).

1347 *Traverses by the plaintiff.*—The plaintiff, on the other hand, is at liberty to traverse the whole of any plea or subsequent pleading of the

(*e*) 15 & 16 Vict. c. 76, ss. 81, 84.
(*f*) 15 & 16 Vict. c. 76, s. 86. Messiter *v.* Roe, 13 C. B. 169.
(*g*) Reg. Gen. 16 Vict., 1 Ell. & Bl. App. lxxix.
(*h*) 15 & 16 Vict. c. 76, ss. 76, 78.

defendant, by a general denial; or, admitting some part or parts thereof, to deny all the rest, or to deny any one or more allegations(*i*).

1348 *Requisites of special pleas.*—A plea pleaded generally to the whole declaration must offer a good answer in point of law to all the causes of action comprised therein. If it does not do this it is bad, and the plaintiff is entitled to judgment for so much as is not covered by the plea(*k*). A plea, which is a good plea to some only of the counts of a declaration, should in the introductory part thereof be confined to those counts, and not be pleaded generally to the whole declaration, notwithstanding s. 75 of the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, which enacts, that pleas capable of being construed distributively shall be taken distributively, for that has reference only to the finding of the jury upon the issues joined(*l*). If a plea, which professes to answer the whole of the declaration, is in truth an answer only to part, the plaintiff may be entitled to judgment *non obstante veredicto*(*m*).

In an action of libel, where the declaration sets out several distinct libels in different counts, the defendant cannot plead one plea in justification of the whole, but must plead the truth of the libel to each count separately(*n*).

Any plea, good in substance, is not objectionable on the ground of its treating the declaration either as framed for a breach of contract or for a wrong (s. 74).

Where proof of the precise locality is material to the defence, and the place is not described in the declaration (*ante*, p. 1146), the defendant is bound to show it by his pleading(*o*).

1349 *Fictitious and needless averments in pleading.*—All statements which need not be proved, such as the statement of time, quantity, quality, and value, where these are immaterial; the statement of losing and finding, and bailment, in actions for goods, or their value; the statement of acts of trespass having been committed with force and arms, and against the peace, etc., and all statements of a like kind, are to be omitted in pleading(*p*).

"It is an elementary rule in pleading, that when a state of facts is

(*i*) 15 & 16 Vict. c. 76, s. 77.
(*k*) Rogers *v.* Spence, 12 Cl. & Fin. 718.
(*l*) Jervis, C.J., Gabriel *v.* Dresser, 15 C. B. 627. Wilkinson *v.* Kirby, 23 Law J., C. P. 224. Chappell *v.* Davidson, 18 C. B. 194. But see Blagrave *v.* Brist. Wat. Co., 1 H. & N. 387.
(*m*) Lyne *v.* Siesfeld, 1 H. & N. 281.
(*n*) Honess *v.* Stubbs, 7 C. B., N. S. 555; *ante*, p. 978.
(*o*) Webber *v.* Sparkes, 10 M. & W. 487. Ellison *v.* Isles, 11 Ad. & E. 676.
(*p*) 15 & 16 Vict. c. 76, s. 49.

relied on it is enough to allege it simply, without setting out the subordinate facts which are the means of producing it, or the evidence sustaining the allegation. Thus, in a case very familiar, if a trespass be justified by a plea of highway, the pleader never states how the *locus in quo* became a highway; and if the plaintiff's case is that the *locus in quo*, by an order of justices, award of inclosure commissioners, local act of parliament, or any other lawful means, had ceased to be a highway at the time alleged in the declaration, he simply puts in issue the fact of its being a highway at the time, without alleging the particular mode by which he intends to show, in proof, that it had before then ceased to be such. The certainty or particularity of pleading is directed, not to the disclosure of the case of a party, but to the informing the court, the jury, and the opponent, of the specific proposition for which he contends; and a scarcely less important object is the bringing the parties to issue on a simple and certain point, avoiding that proxility and uncertainty which would very probably arise from stating all the steps which lead up to that point"(*q*).

1350 *Defences arising after the commencement of the action* may be pleaded, together with pleas of defences arising before the commencement of the action, but the plaintiff may confess such plea, and become entitled to the costs of the cause up to the time of pleading such plea. The rule does not apply to the case of a plea pleaded by one or more only out of several defendants(*r*). Any defence arising after the commencement of the action must be pleaded according to the fact, without any formal commencement or conclusion, and any plea which does not state whether the defence therein set up arose before or after action, will be deemed to be a plea of matter arising before action(*s*).

1351 *Payment of money into court by way of compensation or amends.*—By 15 & 16 Vict. c. 76, it is enacted (s. 70), that it shall be lawful for the defendant in all actions except actions for assault and battery, false imprisonment, libel, slander, malicious arrest or prosecution, criminal conversation (which is now abolished), or debauching the plaintiff's daughter or servant, and, by leave of the court or a judge, upon such terms as they or he may think fit, for one or more of several defendants, to pay into court a sum of money by way of compensation or amends, and such payment is to be pleaded, as near as may be, in the form given by s. 71 of the statute. However, in trespass for breaking

(*q*) Williams *v.* Wilcox, 8 Ad. & E. 333.
(*r*) R. . Gen. 16 Vict., 1 Ell. & Bl. App. lxxxii.
(*s*) 15 & 16 Vict. c. 76, s. 68.

and entering the plaintiff's house, and assaulting his son, whereby the plaintiff lost his son's services, it was held that the defendant might pay money into court(*t*), and in cases of libel and slander payment into court, together with a plea of apology, may be made as mentioned *ante*, p. 977. The plaintiff may reply to the plea by accepting the sum paid into court in full satisfaction and discharge of the cause of action in respect of which it has been paid in, and is at liberty, in that case, to tax his costs, and, in case of non-payment thereof, within forty-eight hours, to sign judgment for such costs; or the plaintiff may reply that the sum paid into court is not enough to satisfy the claim of the plaintiff in respect of the matter to which the plea is pleaded; and, in the event of an issue thereon being found for the defendant, the defendant is entitled to judgment and his costs of suit(*u*).

1352 *Plea of infancy in actions ex delicto.*—A plea of infancy constitutes no defence, as we have seen, to an action for an assault or false imprisonment, or to an action of libel and slander, or for seduction; but it is an answer to an action for deceit, and to actions of tort founded on contract, such as an action for a false and fraudulent representation by an infant that he was of full age, whereby the plaintiff was induced to contract with him; for if such an action was maintainable, all the pleas of infancy would be taken away, as such affirmations are in every contract(*x*).

1353 *Plea of accord and satisfaction.*—Whenever the plaintiff has consented to receive, and has actually received, satisfaction and recompense for the injury he has sustained, the cause of action is discharged, although the satisfaction and recompense were not one hundredth part of the value of his loss; for, by his own accord and agreement, the injury is dispensed with, and in all actions in which nothing but amends are to be recovered in damages, there a concord carried into execution is a good plea(*y*). The ordinary form of a plea of accord and satisfaction is to the effect that, after the accrual of the cause of action, and before the commencement of the suit, the defendant delivered to the plaintiff, and the plaintiff accepted from the defendant, certain goods and chattels, or moneys, or securities for money, etc., specifying the nature and character of the things delivered in full satisfaction and discharge of the cause of action, and of all damages sustained there-

(*t*) Newton *v.* Holford, 6 Q. B. 921. Aston *v.* Perkes, 15 M. & W. 385.
(*u*) As to the effect of a payment of money into court in actions of tort, see *post*, s. 2.
(*x*) Johnson *v.* Pye, 1 Sid. 258. Liv. Adel. Loan Ass. *v.* Fairhurst, 9 Exch. 430.
(*y*) Andrew *v.* Boughey, Dyer, 75b.

from by the defendant. To support this plea it must be proved that the satisfaction was given and accepted in respect of the identical cause of action included in the declaration; for where a plaintiff who had received some internal injury in a railway collision, but was not aware of it, accepted a small sum of money as compensation for damage done to his clothes and hat, and then brought an action for the injury to the person, it was held that such cause of action was untouched by the accord and satisfaction in respect of the injury to the clothes(*z*). And in cases where the person injured has been induced by the false representations of the medical officers of the railway company to accept a small and almost nominal sum in full of all demands, and to give a receipt for the same, the company will be restrained from setting up the plea of accord and satisfaction or relying upon the receipt given at all(*a*).

Either money or chattels, railway bonds or negotiable securities or an estate or interest in land, or a mere agreement only, may be given, granted, or surrendered, and accepted by way of compensation and amends for the damages that may have been sustained. If the goods of the defendant are in the hands of the plaintiff, and it is agreed between the plaintiff and defendant that the plaintiff shall retain these goods as his own property, in satisfaction and discharge of the cause of action, and the goods are accordingly retained and accepted by the plaintiff in satisfaction, etc., this is a valid accord executed, and is pleadable in bar of an action(*b*). But the delivery and acceptance of a man's own goods and chattels constitute no satisfaction. Thus, in an action of trespass against a defendant in respect of an entry by him upon the plaintiff's land, the defendant said that after the entry there was an accord between them that the plaintiff should re-enter into the same land, and should enjoy it without interruption by the defendant, and that the defendant should deliver to the plaintiff all the title deeds concerning the said land, that the plaintiff had

(*z*) Roberts *v.* E. C. Rail. Co., 1 F. & F. 460. See Lee *v.* Lancashire and Yorkshire Rwy., L. R., 6 Ch. App. 527. As to accord and satisfaction for the injury and *all* its consequences, Rideal *v.* Gt. West. Rail. Co., ib. 706. As to inspection of the reports of railway officials and medical men to the company, see Baker *v.* Lond. and South-West. Rail. Co., L. R., 3 Q. B. 91; Cossey *v.* London and Brighton Rwy., L. R., 5 C. P. 146. And as to inspection generally, Woolley *v.* North Lond. Rwy., L. R., 4 C. P. 602; 38 Law J., C. P. 317. Pape *v.* Lister, L. R., 6 Q. B. 242. Mahoney *v.* Widows Life Assurance Fund, L. R., 6 C. P. 252. Richards *v.* Gellatly, L. R., 7 C. P. 127. In an action by a father for the seduction of his child, a plea of accord and satisfaction cannot be supported by a receipt given by the daughter releasing the defendant from all claims and demands on account of bearing birth and raising of the child. Sellars *v.* Kinder, 1 Head (Tenn.), 134.

(*a*) Stewart *v.* Gt. West. Rwy., 2 De G., J. & S. 319.

(*b*) Jones *v.* Sawkins, 5 C. B. 142

re-entered, and that the defendant had delivered the title deeds; and it was held that this was no answer, for it must be intended that the title deeds were the plaintiff's own title deeds, and then to deliver him his own deeds, and put him in possession of his own land, was no satisfaction of the wrong done before in keeping him out; but it was admitted, that if the defendant had shown any title in himself to the possession of the deeds, then his delivering them up would have been a good bar to the action(*c*).

The meaning of an accord and satisfaction is, that there has been an agreement for something to be done in satisfaction and discharge of the cause of action, and that the agreement has been completely performed, so that there is a total extinguishment of the original cause of action. The plea, therefore, must set forth an accord executed, showing a complete performance by the defendant of the substituted contract(*d*). Where the defendant had slandered the plaintiff, and after the utterance of the slander the plaintiff and defendant met, and it was agreed that certain letters and documents in the handwriting of the plaintiff, in the possession of the defendant, containing certain proofs against the plaintiff of the truth of the charges made by the defendant, should be burnt, and that no action should be brought, and the letters were burnt, but the plaintiff, nevertheless, brought an action, it was held that the accord executed was a bar to the action(*e*).

1354 *Plea of the pendency of another action for the same wrong.*—"The law abhors multiplicty of actions, and therefore, whenever it appears upon record that the plaintiff has sued out two writs against the same defendant for the same thing, the second writ shall abate"(*f*). Therefore, in an action of trespass for a horse, it is a good plea in abatement that another action is pending for the same trespass, whether the action be in the same court or in another and different court of co-ordinate jurisdiction(*g*). But the pendency of a suit in an inferier court(*h*), or in a foreign court(*i*), cannot be pleaded to an

(*c*) Bro. Abr. ACCORD, 1.

(*d*) Gabriel *v.* Dresser, 15 C. B. 622. Hearn *v.* Kiehl, 38 Penn. St. 147. Coquillard *v.* French, 19 Ind. 274.

(*e*) Lane *v.* Applegate, 1 Stark. 97. As to an agreement for the making and acceptance of a public apology, Boosey *v.* Wood, 34 Law J., C. P. 65.

(*f*) Bac. Abr,. ABATEMENT, M.

(*g*) Lev. Ent. 54. Sparry's case, 5 Co. 62a; Com. Dig., ABATEMENT, H. 24.

(*h*) Laughton *v.* Taylor, 6 M. & W. 695.

(*i*) Cox *v.* Mitchell, 29 Law J., C. P. 33. Ostell *v.* Lepage, 5 De G. & Sm. 95. Scott *v.* Ld. Seymour, 31 Law J., Exch. 457. Scott *v.* Pilkington, 31 Law J., Q. B. 81. As to two actions for the same cause in the Admiralty Court in this country and abroad, see The Mali Ivo, L. R., 2 Adm. & Eccl. 356.

action in one of the courts of Westminster for the recovery of the same demand; and if an action be brought in the county court, the pendency of an action in the superior court does not oust the jurisdiction of the county court(*k*); also, if the two suits are in their nature different, if the proceeding in one is *in rem*, and the other *in personam*, the pendency of the one cannot be pleaded in suspension of the other(*l*). If a plaintiff sues both at law and in equity for the same cause of action, he may be compelled to elect in which suit he will proceed(*m*).

The court in many cases will relieve on motion where different actions are brought for the same cause, instead of putting the party to plead. Thus, where compensation in damages has been claimed for a trespass committed by several persons, and full compensation in damages has been received from one of the co-trespassers, the court will interefere summarily to prevent the plaintiff from seeking the same compensation a second time from another co-trespasser; but where the injury done is an injury to character from the publication of a libel, the court will not interfere in a summary way to prevent the continuance of proceedings against the publisher of the libel, on the ground that damages have been recovered by the plaintiff from another publisher of the same libel, as the nature and extent of the injury in each particular case depend upon the extent of the circulation of the libel(*n*).

1355 *Plea of judgment recovered*(*o*).—Whenever judgment has been recovered in an action of tort, the judgment, if pleaded, is a bar to any subsequent action for the same wrong; "for you shall not bring the same cause of action twice to a final determination; *nemo debet bis vexari pro eadem causâ:* and what is the same cause of action is, where the same evidence will support both actions"(*p*). But by allowing judgment to go by default in an action to which there is a good defence, the defendant is not precluded from setting up such defence in any subsequent action in which the matter may arise between the same

(*k*) M'Muray *v.* Wright, 11 W. R. 85. Bissil *v.* Williamson, 7 Exch. 391.

(*l*) Harmer *v.* Bell, 7 Moore, P. C. 281. An answer setting up the pendency of another suit in a tribunal of competent jurisdiction must contain an averment that the parties and the subject matter are the same. Bourland *v.* Nixon, 27 Ark. 315. It must also state that such former suit is still pending at the time the answer is interposed. Hopwood *v.* Patterson, 2 Oregon, 269.

(*m*) Simpson *v.* Sadd, 24 Law J., C. P. 156.

(*n*) Martin *v.* Kennedy, 2 B. & P. 69.

(*o*) As to the effect of a foreign judgment *in rem*, see Castrique *v.* Imrie, L. R., 4 Engl. & Ir. App. 414.

(*p*) Kitchen *v.* Campbell, 3 Wils. 304; 2 W. Bl. 827.

parties(q). In an action for slander you cannot have an action twice over against the same person for the utterance of the same words on the same occasion, but every fresh utterance and publication of the slander create a fresh cause of action, so that you may have two actions for words spoken at different times, conveying distinct imputations upon the plaintiff; and judgment recovered in the first action would be no bar to the second action. Every plea alleging that the plaintiff brought a prior action against the defendant for the same wrong, and recovered judgment therein(r), must contain in the margin thereof a statement of the date of such judgment; and, if such judgment be in a court of record, of the number of the roll, if any, on which the proceedings are entered. In default of such statement, the plaintiff will be at liberty to sign judgment as for want of a plea; and in case the same be falsely stated by the defendant, the plaintiff, on producing a certificate from the proper officer or person having the custody of the records or proceedings of the court where such judgment is alleged to have been recovered, that there is no such record or entry of a judgment as therein stated, is at liberty to sign judgment as for want of a plea(s).

If the record, when produced, shows on the face of it that the cause of action in the second suit is not the same as that for which judgment was recovered in the former action, the record at once disproves the plea, and the plaintiff will be entitled to a verdict(t). But the varying of the form of the claim, where the claim is substantially the same, will not be allowed to defeat the operation of the rule. Therefore, where a servant in husbandry, being hired for a quarter of a year, and having entered the service, was discharged therefrom before the end of the quarter, and then sued her master in the county court for discharging her without reasonable cause, and her master obtained a verdict on the ground that he had good cause for dismissing her, and the servant then, after the quarter elapsed, took out a summons before justices against her master to recover the quarter's wages, it was held that the question before the justices under this summons was substantially the same as that which had been adjudicated upon by the county court, *viz.*, whether the dismissal was wrongful; that the decision in

(q) Howlett v. Tarte, 31 L. J., C. P. 150.
(r) See Basham v. Lumley, 3 C. & P. 489 n.
(s) Reg. Gen. Hil. T., 16 Vict., R. 10; 1 Ell. & Bl. App. iii. See Williamson v. Foreman, 23 Ind. 540; Ringle v. Weston, id. 588; Heatherly v. Hadley, 2 Oregon, 269; Columbus, etc., R. R. Co. v. Watson, 26 Ind. 50.
(t) Wadsworth v. Bentley, 23 Law J., Q. B. 3.

the county court was conclusive between the parties, and could not be reviewed by the justices. "It was open to the justices," observes Cockburn, C.J., "to inquire whether the county court had jurisdiction, and whether the judge had determined that the discharge of the respondent was rightful; but as soon as they had ascertained both those facts in the affirmative, they were bound by law to treat the decision of the county court as conclusive between the parties, and not to allow the dispute as to the discharge being wrongful, to be reopened"(*u*).

The recovering from a servant of damages for leaving the service of his master, has been held to be a bar to a second action against another person for seducing the servant away from his master's service, because the damage for the loss of service was compensated for in the first action(*x*).

If two commit a joint tort, the judgment against one is of itself, without execution, a sufficient bar to an action against the other for the same cause(*y*); and whenever the cause of action in the two suits is identical, the recovery of judgment in the one is a bar to the other(*z*). A judgment, therefore, in a county court, is a bar to an action on the same subject-matter in any other court(*a*). If, therefore, two persons jointly convert goods, and one of them receives the proceeds, you cannot, after a judgment against one in trover, which is unsatisfied, have an action against the other for the same conversion; or, having once elected to treat the matter as a wrong, bring an action against the other for money had and received, to recover the value of the goods(*b*). But a judgment obtained upon some technical collateral point, not touching the substantial cause of action between the parties, is no bar to a subsequent action. If the plaintiff makes a mistake in his declaration, and the defendant demurs, and judgment is given for him, the plaintiff may rectify the mistake in a second action(*c*). "Where the declaration in the second action is framed in such a manner that the causes of action may be the same as those in the first suit, it is incumbent on the party bringing the second action to show

(*u*) Routledge *v.* Hislop, 29 Law J., M. C. 90.

(*x*) Bird *v.* Randall, 3 Burr. 1345.

(*y*) King *v.* Hoare, 13 M. & W. 504–506. Brinsmead *v.* Harrison, L. R., 6 C. P. 584. See North. Pennsylvania R. R. Co. *v.* Mahoney, 57 Penn. St. 187.

(*z*) Slade's case, 4 Co. 94b. Phillips *v.* Berryman, 3 Doug. 288.

(*a*) Austin *v.* Mills, 9 Exch. 288; 23 Law J., Exch. 42.

(*b*) Buckland *v.* Johnson, 15 C. B. 161; 23 Law J., C. P. 204. Brown *v.* Wootton, Cro. Jac. 73. Brinsmead *v.* Harrison, *supra*.

(*c*) Lampen *v.* Kedgewin, 1 Mod. 207.

that they are not the same "(*d*). "The plaintiff who brings a second action, ought not to leave it to nice investigation to see whether the two causes of action be the same; he ought to show, beyond all controversy, that the second is a different cause of action from the first." Where there are two distinct demands not in the least blended together, and the plaintiff has failed through inadvertence in proving one of them, he may maintain a second action for the other(*e*). Whenever the same point was not in issue in the prior action, the judgment in such prior action can have no effect upon the second action(*f*); but when the pleading and the state of the record are such that the plaintiff might, if he had thought fit, have recovered his whole demand in the first action, he cannot afterwards be allowed to recover it in a second action.

Recovery of judgment upon a contract with insurers against loss is, as we have seen, no bar to an action against the wrong-doer who occasioned the loss, although the insurer has received a full indemnity(*g*).

A plea of the recovery of judgment and damages in an action for a false imprisonment upon a charge of felony, is no answer to an action for a malicious prosecution for the same felony. "It is altogether," observes Parke, B., "a different cause of action. The taking a man upon a charge of felony, is distinct from the act of going before a grand jury and falsely and maliciously taking an oath to get a bill found against him for the same felony, and then going before a petty jury and trying to induce them to find him guilty(*h*).

Where the second action is founded upon some special damage flowing from the original wrong, a plea of judgment recovered in an action for such original wrong, will be a bar to such second action,

(*d*) Bagot (Lord) *v.* Williams, 3 B. & C. 239.

(*e*) Seddon *v.* Tutop, 6 T. R. 609.

(*f*) Carter *v.* James, 13 M. & W. 137. Howlett *v.* Tarte, 31 Law J., C. P. 146.

(*g*) Yates *v.* Whyte, 4 B. N. C. 282; *ante*, pp. 310, 519.

(*h*) Guest *v.* Warren, 9 Exch. 379; 23 Law J., Exch. 121. An injured party cannot be entitled to two recoveries for the same cause. Thus, if a person prefers a false and malicious charge before a magistrate against another for the purpose of having him arrested and imprisoned, and the party arrested recover judgment against his accuser in an action for malicious prosecution, he cannot also maintain an action of slander for uttering the words used in making such charge; as in the action for malicious prosecution the plaintiff must have recovered damages not only for the unlawful arrest and imprisonment and the expenses of his defence, but also for the injury to his fame and character by reason of the false accusation. Sheldon *v.* Carpenter, 4 N. Y. 579.

But if the defendant in the action for malicious prosecution afterwards, in the presence of third parties, repeat the same general charge or accusation which was the foundation of the arrest and imprisonment for which such action was brought, an action of slander may be maintained against him for the last utterance, notwithstanding the recovery of a judgment against him in the former action. Rockwell *v.* Brown, 36 N. Y. 207.

unless the special damage alleged in the declaration be shown to constitute a new cause of action. Thus, where the plaintiff in his declaration alleged that the defendant beat the plaintiff's head against the ground, and that the plaintiff brought an action of assault and battery for that and recovered damages, and that since the recovery of such damages, by reason of the same battery, a piece of the plaintiff's skull had come out, and the defendant pleaded in bar the recovery mentioned in the declaration, and averred it to be for the same assault and battery, and the plaintiff demurred, and it was urged that this subsequent damage was a new matter which could not be given in evidence in the first action, when it was not known, it was held that the recovery of damages in the first action was an absolute bar to any subsequent action for the same battery(*i*).

1856 *Continuing injuries—Judgment recovered.*—But where the injury is of a continuing nature, the bringing of an action and the recovery of damages for the perpetration of the original wrong does not prevent the injured party from bringing a fresh action for the continuance of the injury. Thus, if a building has been wrongfully erected upon the plaintiff's land, and the plaintiff has brought an action and recovered damages for the trespass, he is not thereby precluded from bringing a fresh action and recovering fresh damages for the continuance of the erection. If the defendant, for example, has thrown a heap of stones on the land of the plaintiff, and leaves them there, the defendant is responsible in trespass from day to day until they are removed. Thus, where the trustees of a turnpike road built buttresses on the land of the plaintiff to support the road, and the plaintiff thereupon sued them and their workmen in trespass for such erection, and accepted money paid into court in full satisfaction of the trespass, it was held that after notice to the defendants to remove the buttresses, and a refusal to do so, the plaintiff might bring another action of trespass against them for keeping and continuing the buttresses on the land, to which the former recovery was no bar(*k*).

So where an action was brought against the defendant for obstructing an ancient window of the plaintiff's house, by keeping and continuing a certain roof before then wrongfully erected adjoining the said house, to the injury of the plaintiff's reversion, and a former judgment recovered by the plaintiff against the defendant for the

(*i*) Fetter *v.* Beale, 1 Salk. 11.

(*k*) Holmes *v.* Wilson, 10 Ad. & E. 503. Every continuance of a nuisance is a fresh cause of action. Beckwith *v.* Griswold, 29 Barb. 291. Conhocton Stone Co. *v.* Buffalo, etc., R. R. Co., 52 Barb. 390. Pillsbury *v.* Moore, 44 Me. 154.

same grievance was pleaded in bar, and the plaintiff replied that the grievances were not the same, and issue was joined thereupon, and it appeared that on a former trial between the same parties of an action for an injury to the plaintiff's reversion in the same premises by erecting and keeping up the roof, the plaintiff recovered damages, it was held that such recovery was no bar to the second action; for if the erection of the roof in the first instance was an injury to the reversion, the continuance of it subsequently to the first action was a fresh injury to the reversioner, in respect of which a fresh action was maintainable(*l*).

But where the injury is not of a continuing nature, and the damages which flow therefrom, when they accrue, have accrued once for all, then the recovery of judgment in a previous action is, as we have seen, a good bar. Thus, if a man has dug a pit, or made a trench in another's land, and an action has been brought and damages have been recovered for the injury, such recovery of damages is a complete satisfaction for the wrong done in cutting into the plaintiff's land, and no other action is maintainable(*m*); but where a man digs a trench or deepens a ditch in his own land, which has the effect of injuriously diverting water from his neighbor's stream, or of diminishing the supply of water to a neighbor's mill, then there is a continuing injury so long as the trench remains open, and the ditch deepened, and the diverted water is allowed to run through it to the injury of the neighboring proprietor.

When both landlord and tenant are responsible for the injury, the plaintiff may proceed against either at his election; but he can have but one satisfaction for the same wrong, and having sued and recovered judgment against one, he cannot recover against the other(*n*).

1357 *Effect of the recovery of judgment in actions for the conversion of property.*—We have already seen, that by a recovery of judgment in an action for the conversion of property, the plaintiff's right of property in the things converted is barred, and the property vests in the defendant in the action(*o*). The property in the goods is changed by relation from the time of the conversion. It is not, however, the recovery only, but the recovery coupled with the payment of the damages, that changes the property(*p*).

(*l*) Shadwell *v.* Hutchinson, 2 B. & Ad. 97.
(*m*) Clegg *v.* Dearden, 12 Q. B. 591.
(*n*) Rosewell *v.* Prior, 2 Salk. 460; 12 Mod. 636. Brent *v.* Haddon, Cro. Jac. 555.
(*o*) Cooper *v.* Shepherd, 3 C. B. 272. Holroyd, J., in Morris *v.* Robinson, 3 B. & C. 206.
(*p*) Brinsmead *v.* Harrison, L. R., 6 C. P. 584.

1358 *Recovery of judgment in rem* is no bar to proceedings *in personam*, and, therefore, a judgment *in rem* in the Admiralty Court is not pleadable in bar of an action for damages(*q*). So, conversely, a judgment *in personam*, e.g. in an action at law for damages, is no bar to a suit in the Court of Admiralty *in rem*. Where there is a remedy both *in personam* and *in rem* a person who has resorted to one of the remedies may, if he does not thereby get fully satisfied, resort to the other(*r*).

1359 *Plea of the bankruptcy of the plaintiff*.—By s. 142 of the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, it is enacted, that the bankruptcy of the plaintiff in an action shall not be pleaded in bar to such action, unless the assignees shall decline to continue and give security for the costs thereof, upon a judge's order to be obtained for that purpose within such reasonable time as the judge may order, but the proceedings may be stayed until such election is made; and in case the assignees neglect or refuse to continue the action and give such security within the time limited by the order, the defendant may, within eight days after such neglect or refusal, plead the bankruptcy.

1360 *Pleas of the Statute of Limitations*.—By 21 Jac. 1, c. 16, s. 3, it is enacted, that all actions of trespass *quare clausum fregit*, all actions of trespass, detinue, trover, and replevin for taking away of goods and cattle, all actions upon the case, and all actions of assault, menace, battery, wounding, and imprisonment, or any of them, shall be commenced within the time and limitation thereafter expressed, and not after; that is to say, the said actions upon the case other than for slander, and the said actions for trespass, detinue, and replevin for goods or cattle, and the said actions of trespass *quare clausum fregit*, within six years next after the cause of such actions or suit, and not after; and the said action of trespass, of assault, battery, wounding, imprisonment, or any of them, within four years next after the cause of such actions or suit, and not after; and the said actions upon the case for words within two years next after the words spoken, and not after, but (s. 4) if in any of the said actions judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment the judgment be given against the plaintiff, that he take nothing by his plaint or writ, the plaintiff, his heirs, executors, etc., may commence a new action within a year after such judgment reversed, or given against the plaintiff, and not after. And by 19 and 20 Vict. c. 97, s. 10, absence beyond seas, or imprisonment at the time of the accrual of the cause

(*q*) Nelson *v.* Couch, 33 L. J., C. P. 46. (*r*) Yeo *v.* Tatem, L. R., 3 P. C. C. 696.

of action, is no longer to have the effect of extending the period of limitation. This section is retrospective(*s*).

1361 *Commencement of the period of limitation.*—The time of limitation begins to run from the accrual of the cause of action; and when an act has been done which is lawful in itself, but becomes unlawful only in case it causes damage and injury to another, the time of limitation will run, not from the period of the doing of the lawful act, but from the time of the accrual of the damage, and the consequent conversion of the act which was lawful in its inception into a tort. Thus, where one person is possessed of the surface of land, and another is owner of the subsoil, and the owner of the subsoil excavates therein for minerals, without causing any immediate apparent injury to the surface, but damage ultimately ensues, and the surface subsides, the time of limitation will begin to run from the time when the damage manifested itself, and not from the period of the making of the excavation(*t*). Whenever one person does anything or permits anything to be done on his own land which causes injury to his neighbor, and the injury is of a continuing nature, the cause of action, as we have seen, continues, and is renewed, *de die in diem*, as long as the cause of the continuing damage is allowed to continue. If a man, by digging and constructing basins and canals on his own land, causes a stream of water to flow against his neighbor's wall, and gradually to undermine it, so that at last the wall falls, the period of limitation runs from the time of the falling of the wall, and not from the time of the construction of the basins and canals(*u*). And if a man, by digging on his own land, wrongfully lays open the foundations of his neighbor's wall, and causes them to be gradually weakened by the effect of flowing water, rain and frost, so that at last the wall falls, the time of limitation runs from the time of the falling of the wall, and not from the time of the excavation of the soil(*v*). And in all cases of continuing nuisances and injuries arising from a continuing wrongful act, there is a continuing cause of action(*x*). Where slanderous words are uttered which create no cause of action unless they are followed by special damage,

(*s*) Cornill *v.* Hudson, 8 E. & B. 429; 27 Law J., Q. B. 8. Pardo *v.* Bingham, L. R., 4 Ch. App. 735.

(*t*) Bononi *v.* Backhouse, 28 Law J., Q. B. 378; 34 Ib., Q. B. 181. Ld. Wensleydale, Rowbotham *v.* Wilson, 8 H. L. C. 359; 30 Law J., Q. B. 265. See Smith *v.* Thackerah, L. R., 1 C. P. 564.

(*u*) Gillon *v.* Boddington, Ry. & M. 161.

(*v*) Roberts *v.* Read, 16 East, 217.

(*x*) Whitehouse *v.* Fell, 30 Law J., C. P. 305. Beckwith *v.* Griswold, 29 Barb. 291. Conhocton Stone Co. *v.* Buffalo, etc., R. R. Co., 52 Barb. 390. Pillsbury *v.* Moore, 44 Me. 154.

the period of limitation runs from the time that special damage accrues, and not from the time of the utterance of the words(*y*).

Where an action is brought against a justice of the peace for a false and malicious imprisonment (*ante*, p. 869), every continuance of the imprisonment *de die in diem* is, in point of law, a new imprisonment, and, therefore, the time of limitation runs from the last day of such imprisonment, and not from the time of the issuing of the warrant(*z*).

As a general rule, the period of limitation runs from the time of the commission of the wrongful act, and not from the time of the knowledge of that act by the plaintiff, there being no proof of any fraud practiced by the defendant in order to conceal that knowledge from the plaintiff(*a*). Thus, in actions for negligence or for a breach of duty, the cause of action accrues at the time of the occurrence of the act of negligence or the breach of duty, and not from the period of its discovery by the plaintiff. If, therefore, an attorney or agent has been guilty of a neglect of duty, and the injurious consequences thereof do not come to the knowledge of the principal until after the lapse of six years from the occurrence of the wrongful act, the right of action of the principal is barred(*b*). But in actions of detinue, where the defendant has goods under his charge under an implied contract to re-deliver them on request, and has wrongfully dealt with them without the knowledge of the owner, the period of limitation runs either from the date of such conversion, or, at the option of the owner, from the date of the defendant's breach of duty by refusing to re-deliver on request(*c*).

(*y*) Saunders *v.* Edwards, 1 Sid. 95; see *ante*, p. 6.

(*z*) Hardy *v.* Ryle, 9 B. & C. 603. Massey *v.* Johnson, 12 East, 68. On an implied warranty of title to chattels sold by one in possession, the statute does not commence to run until the purchaser is disturbed in his possession by the true owner. Gross *v.* Kierski, 41 Cal. 111.

And the statute does not commence to run against a right of action for the conversion of bonds loaned as collateral security, before a demand and refusal. Roberts *v.* Berdell, 61 Barb. 37. Buffington *v.* Alen, 7 Bush (Ky.), 232.

The statute begins to run against a cause of action to recover damages for fraudulent representations made upon the sale of real estate in regard to incumbrances, the moment the bargain is completed by the conveyance of the premises to the purchaser, without regard to the time of the discovery of the fraud by the purchaser. Northrop *v.* Hill, 61 Barb. 186.

The act of seduction fixes the time when the statute begins to run under the Kentucky statute. But in an action by the parent for the loss of services of the daughter, and the expenses resulting from the seduction, the statute begins to run from her recovery, after the birth of the child. Wilhoit *v.* Hancock, 5 Bush (Ky.), 567.

When a justice of the peace has neglected to perform an official duty, thereby occasioning loss, the statute begins to run against the resulting cause of action from the date of the negligence, and not from the time the party injured first knew of it. Leonard *v.* Snellbaker, 1 Ohio (N. S.), 276.

(*a*) Granger *v.* George, 7 D. & R. 730; 5 B. & C. 149.

(*b*) Howell *v.* Young, 5 B. & C. 265.

(*c*) Wilkinson *v.* Verity, L. R., 6 C. P. 206.

1362 *Extension of the period of limitation in certain cases.*—When the action abates by the death of the plaintiff, or is abated without default of the plaintiff by the act of God, and the period of limitation has run out before the commencement of a fresh action, the courts have indulged the plaintiff with the liberty of suing out a new writ, so that he did it within a reasonable time. One mode of measuring the time was with reference to the time it would occupy in getting to the place where a new writ was to be obtained. Hence the writ got the name of a writ of journey's accounts. But there was no exact limit of time to govern the court in saying what was a reasonable time in getting the writ, and the question is, whether the action is, under the particular circumstances of the case, brought within a reasonable period after the expiration of the time of limitation(*d*).

1363 *Equitable pleas and defences.*—By 17 & 18 Vict. c. 125, s. 83, it is enacted, that it shall be lawful for every defendant, or for a plaintiff in replevin, in any case in any of the superior courts in which, if judgment were obtained, he would be entitled to relief against such judgment on equitable grounds, to plead the facts which entitle him to such relief by way of defence, and these courts are thereby empowered to receive such defence by way of plea, provided that such plea shall begin with the words "for defence on equitable grounds," or words to the like effect. Any such matter (s. 84) which, if it arose before or during the time for pleading, would be an answer to the action by way of plea, may, if it arise after the lapse of the period during which it could be pleaded, be set up by way of *audità querelâ*. The plaintiff may reply (s. 85), in answer to any plea of the defendant, facts which avoid such plea upon equitable grounds; provided that such replication shall begin with the words, "for replication on equitable grounds," or words to the like effect. But it is provided (s. 86), that in case it shall appear to the court, or any judge thereof, that any such equitable plea, or equitable replication, cannot be dealt with by a court of law so as to do justice betwen the parties, it shall be lawful for such court or judge to order the same to be struck out.

Matters which would entitle the defendant to an unconditional and perpetual injunction in equity to restrain an action in respect thereof, may. under this statute, be pleaded by way of equitable defence; but if the matters of defence are not such as to entitle the defendant to unconditional relief, they cannot be made the foundation of a good

(*d*) Curlewis *v.* Mornington, 27 Law J., Q. B. 439.

equitable plea(*e*). Where the plaintiff complained of three grievances, one relating to the obstruction of his lights, another relating to the taking away of the support of his building, and a third to the obstruction of his chimneys, and causing them to smoke, and the defendant pleaded by way of equitable defence that the whole of the grievances complained of arose from the pulling down of an ancient house and the building of another messuage on the site of it, and that the acts causing the grievances complained of were done with the knowledge, consent, and acquiescence of the plaintiff, and upon the faith of his approval of the mode in which they were done, it was held that the plea disclosed a good equitable defence; but that it was well answered by a replication setting up that the acquiescence and consent upon the faith of which those acts were done were obtained from the plaintiff by the representations of the defendant, that none of the grievances complained of would take place if the plaintiff would give his consent as alleged(*f*).

1364 *Joinder of issue.*—Either party may plead in answer to the plea or subsequent pleading of his adversary that he joins issue thereon, and such joinder of issue operates as a denial of the substance of the plea or other subsequent pleading and an issue thereon; and in all cases where the plaintiff's pleading is in denial of the pleading of the defendant, or some part of it, the plaintiff may add a joinder of issue for the defendant (15 & 16 Vict. c. 76, ss. 76–79). The object of this new form of replication, "the plaintiff joins issue on each of the pleas," merely enables a party in a compendious manner to traverse all those allegations in a plea which he could have traversed before; but such matters as, before the above Act, must have been replied specially, must still be so replied; and all matters which must have been pleaded by way of new assignment, must still be so pleaded(*g*).

1365 *Pleadings construed distributively.*—Pleas of payment and set-off, and all other pleadings capable of being construed distributively, are to be taken distributively; and if issue is taken thereon, and so much thereof as shall be sufficient answer to part of the causes of action proved shall be found true by a jury, a verdict is to pass for the defendant in respect of so much of the causes of action as shall be answered, and for the plaintiff in respect of so much of the causes of action as shall not be answered(*h*).

(*e*) Hyde *v.* Graham, Wakley *v.* Froggatt, *ante*, p. 362.
(*f*) Davies *v.* Marshall, *ante*, p. 186. Rawlins *v.* Wickham, 3 De G. & J. 304.
(*g*) Glover *v.* Dixon, 9 Exch. 159. Huddart *v.* Rigby, *infra*.
(*h*) 15 & 16 Vict. c. 76, s. 75. Reg. Gen. Hil. Term, 16 Vict. No. 62; 1 Ell. & Bl. App. xiii Patterson *v.* Harris, 31 Law J., Q. B. 277.

1366 *New assignments.*—"Where the defendant answers what may reasonably be considered the gist of the trespass described in the declaration, it will be presumed that the action is carried on only for that which the defendant has thus attempted to justify, unless the plaintiff intimates by a new assignment that the defendant has overlooked a part of the grievances he complains of, or has altogether misapprehended his meaning"(*i*). Where the defendant has committed several trespasses, either upon the person, goods, or lands of another, some of which are justifiable, and others not, and the action is brought for those trespasses which are not justifiable, but the defendant by his plea answers those only which are justifiable, the plaintiff should by his replication make a new assignment, showing the trespasses for which the plaintiff proceeds(*k*). And where the declaration is general, and the subject-matter thereof divisible, and the plea apparently answers the whole cause of action, but in reality answers only a part, the plaintiff must new assign as to the part not really answered. Thus, where the plaintiff complained that the defendant entered upon the plaintiff's close and cut down one hundred yards of railing, and the defendant pleaded a right of way over the close, and justified the cutting down of the rails, because they obstructed him in the exercise of his right of way, and the plaintiff merely traversed the allegation that the rails were in the highway, and it appeared that some of the rails cut were there, it was held that, upon this issue, both parties must be taken to have agreed that those were the rails in question, and that if the plaintiff meant to go for rails cut down on other parts of his close, he should have so stated by a new assignment(*l*).

The object of a new assignment, therefore, is to correct a mistake occasioned by the generality of the declaration, and is in the nature of a replication to the defendant's plea; or it may be more properly considered as an explanation of the declaration, setting forth the true ground of complaint, as being different from that which is covered by the plea(*m*). The 15 & 16 Vict. c. 76, ss. 87, 88, now regulate the pleading of new assignments, and forms of new assignment are given by schedule B. Nos. 55, 56, and 57, to that Act.

There can be no new assignment for a cause of action not included

(*i*) Monprivatt *v.* Smith, 2 Campb. 176. As to new assignment, see the note to Taylor *v.* Cole, 1 Smith's L. C. 115, 6th ed; Lambert *v.* Hodgson, 1 Bing. 319.

(*k*) See the notes to Greene *v.* Jones, 1 Saund. 299. Robertson *v.* Gantlett, 16 M. & W. 297. Huddart *v.* Rigby, L. R., 5 Q. B. 139.

(*l*) Bracegirdle *v.* Peacock, 8 Q. B. 186.

(*m*) Stephens on Pleading, pp. 205, 206, 7th ed. Ellison *v.* Isles, 11 Ad. & E. 671. Lancashire Waggon Co. *v.* Fitzhugh, 6 H. & N. 502.

in the declaration. A new assignment, therefore, of an entirely new cause of action is bad. The object of it is to inform the defendant that there is another cause of action included in the declaration beyond that which the defendant has answered by his plea, and that the plaintiff means to rely upon the last-named cause of action, and not the cause of action to which the plea is pleaded(*n*). A new assignment admits that the declaration is well answered by the plea. If, therefore, the plaintiff fails to take issue on the plea, but new assigns a distinct substantive trespass, and fails to prove it, the defendant will be entitled to a verdict. Where in trespass the defendant pleaded that the *locus in quo* was part of a common which had been allotted to him, to which the plaintiff new assigned that the trespass complained of was in another place, and upon its being admitted in the opening of the plaintiff's counsel to the jury that the trespass was in the same place, but that the defendant had no title to it, the chief justice said that was decisive against the plaintiff, and that the defendant was entitled to a verdict(*o*).

SECTION II.

PROCEEDINGS AND EVIDENCE AT THE TRIAL.

1367 *Right to begin.*—The sixteen judges have made a resolution that the plaintiff shall begin at the trial in all actions for personal injuries, libel, and slander, although the general issue may not be pleaded, and the affirmative be on the defendant(*p*). And it is now held that the plaintiff should bring his own cause of complaint before the court and jury in every case where he has anything to prove, either as to the facts necessary for his obtaining a verdict, or as to the amount of damages to which he conceives the proof of such facts may entitle him(*q*).

Under the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 18, if counsel announces his intention not to adduce evidence, he cannot afterwards do so(*r*).

(*n*) Rogers *v.* Spence, 12 Cl. & Fin. 719.
(*o*) Anon. cited 16 East, 86. Oakley *v.* Davis, ib. 82. Atkinson *v.* Matteson, 2 T. R. 172.
(*p*) Carter *v.* Jones, 6 C. & P. 64; 1 M. & Rob. 281.
(*q*) Mercer *v.* Whall, 5 Q. B. 458. Taylor on Evidence, §§ 353, 354, 4th ed.
(*r*) Darby *v.* Ouseley, 1 H. & N. 8.

1368 *Proof on the part of the plaintiff.*—If a declaration discloses a state of facts upon which an action may be maintained, although there be neither malice nor fraud, the plaintiff is not bound to prove either, though both be alleged, and may recover upon the liability which the facts disclose, though fraud and malice be disproved, just as where a defendant who is charged with doing an act wilfully may be made responsible for the act and its consequences, whether done wilfully or not(*s*).

When affirmative pleas of justification are put upon the record with the general issue, the plaintiff's counsel may, if he pleases, not only prove the facts of the declaration, but also may in the first instance, and before the defendant's case is gone into at all, go into any evidence which tends to destroy the effect of the justification by way of anticipating the defence; or he may, if he pleases, content himself with proving the fact on the general issue, and then close his case, leaving the defendant to make out his justifications as he can, and afterwards go into evidence, in reply, as to the justifications. But if the plaintiff's counsel, knowing by the pleas what the defence is to be, close their case, and trust to evidence in reply, they are restricted to such evidence as goes exactly to answer the case proved, or attempted to be proved, by the defendant in support of the justifications, and they cannot be allowed to go beyond it(*t*).

Where an act of parliament prohibits the doing of a particular act affecting the public, no person has a right of action against another merely because he has done the prohibited act. The plaintiff must, therefore, prove some special damage, some peculiar injury, beyond that which he may be supposed to sustain in common with the rest of the Queen's subjects by an infringement of the law(*u*).

1369 *Effect of payment of money into court.*—"Formerly it was supposed by the profession that by payment of money into court in an action of tort the defendant admitted the cause of action sued for, and that as the plaintiff was at liberty to prove any cause of action he pleased, consistent with the declaration, it was the duty of the defendant to take care by the form of his pleading or by obtaining particulars on summons, that his admission by payment into court was not used to his prejudice; but of late years this rule has been greatly modified, and it has been held that where in an action of tort the declaration is general and unspecific, the payment of money into court, though it

(*s*) Swinfen *v.* Ld. Chelmsford, 5 H. & N. 920.
(*t*) Pierpoint *v.* Shapland, 1 C. & P. 447.
(*u*) Chamberlaine *v.* Chester & Birkenhead Rail. Co., 1 Exch. 877.

admits a cause of action, does not admit the cause of action sued for, and that the plaintiff must give evidence of the cause of action sued for before he can have larger damages than the amount paid into court. On the other hand, if the declaration is specific, so that nothing would be due to the plaintiff from the defendant, unless the defendant admitted the particular claim made by the declaration, the payment of money into court admits the cause of action sued for, and so stated in the declaration. If the breach is single, and the damages entire, then, of course, it becomes under such circumstances a mere question of damages; but if the damages be compounded of several things, although the payment of money into court may, from the form of declaration, admit the particular cause of action sued for, still it may be necessary to prove the cause of action, with a view to the damages"(*x*).

1370 *Primary and secondary evidence.*—"Our ancestors," observes Best, C.J., "were wise in making it a rule of law that in all cases the best evidence that could be had should be produced; for if the best evidence be kept back, it raises a suspicion that, if produced, it would falsify the secondary evidence on which the party has rested his case." Where, in an action against a wrong-doer for an injury to the reversion, the plaintiff proved that the premises were devised to him, and that the occupier held as tenant to him, the latter fact being established by oral evidence only, though it appeared on cross-examination that he held under a written agreement, the Court of Common Pleas were divided in opinion whether the reversion of the plaintiff had been sufficiently proved(*y*).

Where a witness not a party to the cause, and whose answer will affect the rights of others, is asked a question respecting the contents of a written document, the document itself, must, in general, be produced, as being the primary and best evidence of what it is, whether the inquiry arise on examination-in-chief, cross-examination, or re-examination, or goes to the credit of the witness(*z*). In an action for the infringement of copyright in a musical composition, therefore, a witness was not allowed to be asked, in support of the defendant's plea that the composition in question was not first published in England, whether he had seen printed copies of it for sale in a certain shop in a foreign town, at a date previous to the registration of the copyright in

(*x*) Jervis, C.J., Perrin v. Monm. Rail. Co., 11 C. B. 865.

(*y*) Strother v. Barr, 5 Bing. 151. See Fenn v. Griffith, 6 Bing. 533; Augustien v. Challis, 1 Exch. 279.

(*z*) The Queen's case, 2 B. & B. 286. Macdonnell v. Evans, 11 C. B. 930. Darby v. Ousley, 1 H. & N. 6.

England, no such copies being produced in court, and no proof being given that they could not have been produced(*a*). But this rule did not of course apply to oral statements(*b*). And a witness may now be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the subject-matter of the cause, without such writing being shown him; but if it is intended to contradict him by the writing, his attention must be called to it before it can be used for that purpose(*c*). To exclude oral evidence respecting the contents of a written document, it should appear either that the document itself would be evidence upon the issue if produced, or to contradict the witness if he answered in a particular way, or that the precise terms and language of the writing itself was necessary to be referred to, in order to answer the question(*d*).

A party to the cause is also allowed to affect his own rights by parol admissions respecting the contents of written documents, if he chooses to answer the questions that may be put to him respecting them(*e*). Thus, where in an action for fraudulent misrepresentation as to the price which certain seed would command in London, whereby the plaintiff had been induced to sell seed to the defendant at a lower price than he otherwise would have done, the plaintiff's counsel proposed to ask the defendant, in cross-examination, whether a similar action had not been brought against him in the county court, what was the subject of that action, and what its result, and the defendant's counsel objected to the question on the ground that it related to the contents of a judicial proceeding, the record of which would be the primary and best evidence, it was held that as the defendant was a party to the proceeding, what he said as to the result of it, and the verdict of the jury, would be evidence against him, whether it related to a record or writing or not, and that the question therefore might be put, but that he had the option of answering or not as he pleased(*f*).

"Although," observes Holroyd, J., "it be a general rule of law that the best evidence is to be produced, yet that rule is not to be taken literally, for, with respect to evidence of a person holding an office, such as constable, or holding any official character or appointment, it is not necessary to produce the actual appointment, though it be made

(*a*) Boosey *v.* Davidson, 13 Q. B. 267.
(*b*) Crowley *v.* Page, 7 C. & P. 789.
(*c*) 17 & 18 Vict. c. 125, ss. 24, 108. Sladden *v.* Serjeant, 1 F. & F. 398.
(*d*) Henman *v.* Lester, *infra*.
(*e*) *Ante*, p. 685.
(*f*) Henman *v.* Lester, 12 C. B., N. S. 780; 31 Law J., C. P. 370.

under seal. It is sufficient to show" (as against a wrong-doer), "that the party is actually in the exercise of his office or public employment, and constantly discharging the official or public duties thereof"(*g*). Evidence, also, of persons being trustees or commissioners of turnpikes and excise officers, may be given by proof of their having acted as such, without proof of their appointment(*h*).

Further, the adverse party to a suit may have so treated and dealt with a copy of an original document, as to have admitted the truth of the contents of the copy, and rendered it receivable as primary evidence against him by way of an admission. Thus, a document in the possession of a lord of a manor which he represents to contain a true account of the customs of the manor, would be admissible as primary evidence against him, although it purpots to be a copy of the decree of the Court of Chancery(*i*.) So in an action of replevin, where the question was as to the boundary of a certain estate, depositions made by the defendant in a prior suit against him in chancery by a stranger to the present action were held admissible against him, at all events to the extent and for the purpose for which they were so used by him in the former suit(*k*).

1371 *Notice to produce a written document to let in secondary evidence of its contents.*—Whenever a written instrument which requires to be proved is in the hands of the opposite party, notice to produce it is, generally speaking, necessary, before secondary evidence of its contents can be given. If the document is seen in court at the trial, in the hands of the adverse party or his attorney, notice to produce it at once is all that is required(*l*). But it is open to the opposite party to show that it was not in his possession or under his control at the time the notice was served. Where, therefore, the plaintiff, in an action for an excessive distress, proposed to give secondary evidence of the warrant of distress, and the defendant proved that it had been handed over to the Commissioners of Excise pursuant to the statute, it was held that secondary evidence of its contents was not admissible(*m*).

(*g*) Brewster *v.* Sewall, 3 B. & Ald. 302. Dexter *v.* Hayes, 11 Ir. C. L. R. 106. See Colton *v.* Beardsley, 38 Barb. 29; Swindell *v.* Warden, 7 Jones' Law (N. C.), 575; Tomlinson *v.* Darnall, 2 Head (Tenn.), 538; Allen *v.* State, 21 Ga. 217; Lawrence *v.* Sherman, 2 M'Lean, 488; Potter *v.* Luther, 3 Johns. 431; Dean *v.* Gridley, 10 Wend. 254.

But in an action against an individual who seeks to justify as a public officer, he must show that he was an officer *de jure*. Blake *v.* Sturtevant, 12 N. H. 567. Schleucker *v.* Risley, 3 Scam. 483. See Cummings *v.* Clark, 15 Vt. 653.

(*h*) 3 Geo. 4, c. 126, s. 134; 7 & 8 Geo. 4, c. 53, s. 17. See McCoy *v.* Curtice, 9 Wend. 17.

(*i*) Price *v.* Woodhouse, 3 Exch. 616.

(*k*) Richards *v.* Morgan, 33 Law J., Q. B. 115.

(*l*) Snelgrove *v.* Stevens, Car. & M. 508. Dwyer *v.* Collins, 7 Exch. 639.

(*m*) Harvey *v.* Mitchell, 2 M. & Rob. 366.

However, various instances may be mentioned where notice to produce a writing is unnecessary in order to let in secondary evidence of its contents. This is the case where the instrument produced and that to be proved are duplicate originals; where the instrument to be proved is a notice, such as a notice to quit(*n*); also where, from the nature of the action, the opposite party must know that he is charged with the possession of the document, as where the action is brought for recovering possession of the instrument itself(*o*). So the contents of a notice affixed to the freehold may be proved by oral testimony, without producing or giving notice to produce the board, etc., itself; as where, in an action for shooting the plaintiff's dog, a witness was allowed to give oral evidence (to connect the defendant with the trespass) of a notice affixed to a pole driven into the ground, that "all dogs found trespassing would be shot"(*p*). But portable notices, not affixed to the freehold, must be produced, where they are relied upon as forming the basis of some contract or arrangement between the parties. Thus, in trover against a carrier, where the question was whether the goods were rightfully detained by the defendant in satisfaction of a general lien, it was held that parol evidence could not be given of the contents of a portable notice hung up in the defendant's office, to the effect that all goods carried, etc., would be subject to such general lien, but that the notice itself must be produced(*q*).

If at the trial, *e.g.*, in an action of libel, the plaintiff produces what he alleges to be a copy of the libellous document, and the defendant then produces a document which he alleges to be the original, the judge must determine whether it is the original, for if it is, the copy is inadmissible(*r*).

1372 *Proof of facts resting on hearsay and reputation.*—Hearsay evidence or evidence not founded upon the personal knowledge of the witness, but upon what he has heard another person say respecting some particular fact, is generally speaking inadmissible. But the declarations or statements of deceased persons respecting facts and circumstances, which may be presumed to have been within their own knowledge, are receivable in evidence in certain cases in proof of matters of common reputation or notoriety, and of local and personal or family inter-

(*n*) Doe *v.* Somerton, 7 Q. B. 58. See Doe *v.* Turford, 3 B. & Ad. 890.

(*o*) How *v.* Hall, 14 East, 274. Scott *v.* Jones, 4 Taunt. 864. Whitehead *v.* Scott, 1 M. & Rob. 2. Hammond *v.* Hopping, 13 Wend. 505. Hardin *v.* Kretsinger, 17 Johns. 293. Hart *v.* Robinett, 5 Mo. 11.

(*p*) Bartholomew *v.* Stephens, 8 C. & P. 738.

(*q*) Jones *v.* Tarleton, 9 M. & W. 675.

(*r*) Boyle *v.* Wiseman, 11 Exch. 367.

est. In cases of general rights depending upon immemorial usage, also (*ante*, pp. 134, 243–249), living witnesses can only speak of their own knowledge to what has passed in their own time, and therefore to supply the necessary evidence the law receives the declarations or statements of persons who are dead. But such evidence is admissible only to prove a public right in which all the Queen's subjects are interested. If the right is a mere private prescriptive right, it is inadmissible. When all the inhabitants or tenants of a manor, or all the inhabitants of a particular district are interested (*ante*, p. 121, *et seq.*), the right is of a public nature, and may be supported by hearsay evidence of reputation. Thus the declarations of deceased copyholders are admissible to prove a right of free warren claimed over the whole manor(*s*). So evidence of reputation is admissible to show by whom a certain bridge is repairable *ratione tenuræ*, for that concerns every one who passes along the highway, and all the ratepayers of the county(*t*). But where a certain number only of the tenants of a manor claim separate prescriptive rights of common over the lord's waste (*ante*, pp. 105–109), depending on each separate prescription, these rights are not of a public character, although there be many of them, and they cannot consequently be supported by hearsay evidence of reputation(*u*). Traditionary reputation is, for the same reasons, evidence of boundary between two parishes or manors(*x*), but not of the boundary between two estates(*y*). When the statements and declarations of deceased persons are sought to be given in evidence respecting matters of local interest, it should be shown that such deceased persons were conversant with the locality(*z*). When the right claimed is of a more general nature, such as a right of highway, or of ferry, in which all persons are interested, evidence of what any deceased person has been heard to say respecting the right is receivable, but it would be almost worthless unless it comes from some one having good means of knowledge(*a*). And the declaration or statement of a deceased person with regard to a particular fact which would support or negative the right is inadmissible. Thus, the ancient answers of conventionary tenants of a manor stating the rights of the lord, are admissible even against

(*s*) Carnarvon (Earl) *v.* Villebois, 13 M. & W. 383; 14 Law J., Exch. 233.
(*t*) Reg. *v.* Bedfordshire, 4 Ell. & Bl. 535.
(*u*) Dunraven (Lord) *v.* Llewellyn, 15 Q. B. 809. See Warrick *v.* Queen's College, L. R., 10 Eq. Ca. 105; 6 Ch. App. 716.
(*x*) Nicholls *v.* Parker, 14 East, 331, n.
(*y*) Clothier *v.* Chapman, ib.
(*z*) Weeks *v.* Sparke, 1 M. & S. 689.
(*a*) Parke, B., Crease *v.* Barrett, 1 Cr. M. & R. 929. Pim *v.* Curell, 6 M. & W. 234.

the freeholders of the manor; but if they state a fact only, *e.g.*, that the commons of the manor belong to the tenants without stint on payment of —*l.* per annum, they are not admissible(*b*).

Maps, etc., used by deceased stewards of a manor, stand on the same footing as declarations, but they are only admissible for the purposes for which they have been used. A map, therefore, used only for the purpose of defining the copyholds of a manor, would not be evidence as a declaration as to the existence of a highway marked on it(*c*).

1373 *Entries of deceased persons against their interest*, made in books, accounts, etc., are also admissible. Thus, where the right to the soil is in question, entries made by the deceased steward of a former owner through whom the plaintiff claims title, charging himself with the receipt of money for trespasses committed on the *locus in quo* are admissible(*d*). And when the book in which the entry is found is an ancient book, and comes from the proper custody, it is not necessary to prove the handwriting of the party who made the entry(*e*). But entries in a deceased steward's book made *in his favor*, and not connected with other entries made against him, are not evidence of the facts mentioned in such entries(*f*). Where there are entries in an account-book charging and discharging the person making them, both sides of the account may be looked at; and it is no objection to the reception of an account containing items of charge and discharge, that the balance appears to be in favor of the deceased person making the entries(*g*).

1374 *Entries made by deceased persons in the exercise of their duties* are also admissible. Thus, to disprove a lien in an action of trover, the entry of a tender and refusal of the amount claimed as lien, made by a deceased clerk of the plaintiff's attorney in a day-book kept by him for the purpose of minuting his daily transactions, is admissible(*h*). But where, in an action of deceit, the defendant offered in evidence a book purporting to be made up from slips of paper on which the daily transactions of his business as a pawnbroker were entered, but it appeared that it was kept privately by him at his own house, and that none of his clerks had access to it, the evidence was rejected(*i*).

(*b*) Crease *v.* Barrett, *supra*.
(*c*) Pipe *v.* Fulcher, 1 Ell. & Ell. 111.
(*d*) Barry *v.* Bebbington, 4 T. R. 514. Doe *v.* Stacey, *post*, p. 966.
(*e*) Wynne *v.* Tyrwhit, 4 B. & Ald. 376.
(*f*) Knight *v.* Waterford (Marquis), 4 Y. & C. 284
(*g*) Buller *v.* Michel, 2 Pr. 399. Rowe *v.* Brenton, 3 M. & Ry. 268.
(*h*) Marks *v.* Lahee, 3 B. N. C. 419.
(*i*) Ellis *v.* Cowne, 2 C. & K. 719.

Where the entry is admitted in evidence as being against the interest of the party making it, it carries with it the whole statement; but if the entry is merely an act done in the course of a man's duty, then it is confined to matters within that duty(*k*). Thus where, according to the practice of a sheriff's office, the officer making an arrest was required to make and did make a return signed by him of the arrest, and of the time and place where it was made, and after his death this return was offered in evidence, it was held that it was evidence of the fact of the arrest and perhaps also of the time when, but certainly not of the place where, it was made, and per Denman, C.J., "whatever effect may be due to an entry made in the course of any office reporting facts necessary to the performance of a duty, the statement of other circumstances, however naturally they may be thought to find a place in the narrative, is no proof of those circumstances"(*l*).

1375 *Statements and declarations accompanying an act* are admissible in evidence as part of the *res gesta* to show the real nature and character of the transaction. Thus, the cries of a mob during a riot are admissible in evidence to show the object and intentions of the rioters, and so are the cries and exclamations of a person injured uttered at the time of an alleged assault(*m*). So the exclamations of bystanders when an accident occurs, and the conduct of a particular person is in question, are admissible in evidence, as part of the *res gesta*(*mm*). They may be the result of prejudice or passion, but they are admissible, and the jury must judge what reliance may be placed upon them. A letter written by the plaintiff himself on the day a certain transaction took place, making certain inquiries and directing certain things to be done, which were done in obedience to the letter, has been held admissible in evidence on the part of the plaintiff himself in support of his own case, to show the nature and character of the transaction in which he was engaged(*n*). So where a dressing-case, the property of the defendant's sister-in-law, had been stolen from the defendant's house, and suspicion fell on the plaintiff, and a policeman was sent for, who, on hearing the facts stated by the sister-in-law in

(*k*) Pollock, C.B., in Percival *v.* Nanson, 7 Exch. 8.

(*l*) Chambers *v.* Bernasconi, 1 C. M. & R. 347.

(*m*) Thompson *v.* Trevanion, Skin. 402. The language used by one while committing an assault is admissible as part of the *res gesta*. Macdougall *v.* Maguire, 35 Cal. 274.

So of the conversation of other persons who were present at the time. Castner *v.* Sliker, 33 N. J. Law (4 Vroom), 95.

(*mm*) So of what was said by a person at the time of an accident, of which he was the cause. Courtney *v.* Baker, 34 N. Y. Sup. Ct. Rep. 529.

(*n*) Milne *v.* Leisler, 7 H. & N. 796; 31 Law J., Exch. 237.

the presence of the plaintiff, said, "Do you give her (the plaintiff) into custody?" and the sister-in-law replied, "I will go and ask my brother-in-law" (the defendant), and went out and then returned, it was held that what she said when she came back was admissible in evidence against the defendant as part of the *res gesta*(*o*).

Whenever a wrongful act forming the subject-matter of an action has been done by an agent, bailiff, or servant acting in the ordinary course of his employment, or in obedience to the express directions of his employer or principal, what he says in the course of the transaction is evidence against those he represents(*oo*). In an action for false imprisonment, therefore, what the person into whose custody the defendant commits the plaintiff says, is admissible in evidence against the defendant(*p*). But in an action of detinue against a pawnbroker, where the only evidence of the goods having come to the defendant's hand was a declaration by the pawnbroker's servant that it was a hard case, for his master had advanced 200*l.* upon them at five per cent., it was held that such a declaration was inadmissible, for it was not an ordinary pawnbroking transaction, but a loan by the defendant as by any other person(*q*).

Declarations by one of several tort feasors, in such actions as for negligence, where no common motive or object can exist, are evidence against himself alone, unless they are made in the presence and hearing of the others(*r*); but if several co-defendants be shown by other evidence to have combined together for a common object, what each says as to the motives and circumstances of the trespass, becomes admissible against the other(*s*).

1376 *When the adverse party in a suit is estopped from giving evidence to contradict his own statements and representations to the plaintiff.*—Where one person by his words or conduct wilfully induces another to believe in the existence of a certain state of things, and induces him to act on that belief, or to alter his own previous position, the former is concluded from averring against the latter a different state of things as

(*o*) Harris *v.* Dignum, 29 L. J., Exch. 23.

(*oo*) See Pennsylvania R. R. Co. *v.* Brooks, 57 Penn. St. 339; Thomas *v.* Sternheimer, 29 Md. 268; Tuttle *v.* Turner, 28 Texas, 759; Raisler *v.* Springer, 38 Ala. 703; Cliquot's Champagne, 3 Wall. 114.

(*p*) Powell *v.* Hodgetts, 2 C. & P. 432.

(*q*) Garth *v.* Howard, 8 Bingh. 453.

(*r*) Daniels *v.* Potter, M. & M. 503. De Benedetti *v.* Manchin, 1 Hilt. (N. Y. C. P.) 213.

(*s*) Lord Ellenborough, C.J., in R. *v.* Hardwicke, 11 East, 584. Ellis *v.* Dempsey, 4 W. Va. 126. Jacobs *v.* Shorey, 48 N. H. 100. Dart *v.* Walker, 3 Daly (N. Y.), 138. Jenne *v.* Joslyn, 41 Vt. 478. Lee *v.* Lamprey, 43 N. H. 13. Page *v.* Parker, 40 N. H. 47. McDowell *v.* Rissel, 57 Penn. St. 164. State *v.* Thibeau, 30 Vt. 100.

existing at the same time(*t*). "By the term 'wilfully,'" observes Parke, B., "we must undertsand, if not that the party represents that to be true which he knows to be untrue, at least that he means his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and he did act upon it as true, the party making the representation would be equally precluded from contesting its truth"(*u*).

Where an action was brought for the conversion of a policy of insurance, and the plaintiff proved that he had given instructions to the defendant to effect a policy for him, and gave in evidence a letter from the defendant to the plaintiff stating that he had effected the policy, Lord Mansfield refused to allow the defendant to contradict his own representation, and show that no policy had been effected, and held him liable as an insurer for the amount that would have been recoverable by the plaintiff on the policy if it had been duly effected(*x*).

Wherever, indeed, a man has made a false assertion calculated to lead others to act upon it, and they have done so to their prejudice, he is forbidden, as against them, to deny that assertion. Wherever, also, he has led others into the belief of a certain state of facts by conduct of culpable neglect, calculated to have that result, and they have acted on that belief to their prejudice, he will not be heard afterwards, as against such persons, to show that that state of facts did not exist. In short, a man is not permitted, or at liberty, to charge the consequences of his own fault on others, and complain of that which he has himself brought about(*y*). But the neglect must be in the transaction itself, and be the proximate cause of the injury sustained, and must not be the neglect of some duty owing to third persons, with whom those seeking to set up the estoppel are not privy(*z*).

Thus the principal whose negligence has enabled his agent to cheat a third person acting with ordinary caution, is universally estopped

(*t*) Pickard *v.* Sears, 6 Ad. & E. 474. Piggot *v.* Stratton, 29 Law J., Ch. 9. McCance *v.* Lond. and North-West. Rail. Co., 34 Law J., Exch. 39. Chapman *v.* O'Brien, 34 N. Y. Sup. Ct. Rep. 524. Horn *v.* Cole, 51 N. H. 287. Stevens *v.* Dennett, 51 N. H. 324. McCabe *v.* Raney, 33 Ind. 309. Casco Bank *v.* Keen, 53 Me. 103. Chonteau *v.* Goddin, 39 Mo. 229. Shaw *v.* Beebe, 35 Vt. 205. Wooley *v.* Edson, 35 Vt. 214. Whitacre *v.* Culver, 8 Minn. 133.

(*u*) Freeman *v.* Cooke, 2 Exch. 633. Haines *v.* E. Ind. Co., 11 Moore, P. C. C. 57. Continental National Bank *v.* National Bank of the Commonwealth, 50 N. Y. 575. Manufacturer's Bank *v.* Hazard, 30 N. Y. 226.

(*x*) Harding *v.* Carter, Park on Insurance, 5.

(*y*) Swan *v.* North Brit. Austr. Co., 31 Law J., Exch. 433.

(*z*) Blackburn, J., ib. 32; ib. 277.

from denying the authority of the agent. A retired partner who has given no notice of dissolution to a customer, is estopped from denying the authority of the continuing partner to bind him with that customer. A master who has accredited a servant to a tradesman to order goods in his name, and has recalled the authority from the servant without giving notice to the tradesman, is estopped from denying the authority of the servant to bind him with such tradesman. The same principle applies to instruments under seal. But the party who claims the benefit of this doctrine of estoppel, must show that he has acted in the transaction in which he was deceived with ordinary caution(*a*). So a company, by entering the name of a shareholder on their register under a forged or invalid transfer, represents that the person so entered is entitled to transfer the shares to a third person, and is estopped from denying it; and if the real holder's name is restored to the register, such third person is entitled to sue the company, and to recover the value of the shares at the time they first refused to recognize him as shareholder, with interest(*b*).

1377 *Evidence of manorial customs.*—Proof of entries on the rolls of a manor court are admissible in evidence to prove manorial customs(*c*). A presentment in a manor court, setting forth the bounds of a manor, is likewise evidence of such bounds, although some portion of the document be cut off, if there is no reason to suppose that that part contains any evidence to the contrary of the part produced. When an ancient manor-book is offered in evidence, it must be proved that it comes from the proper custody(*d*).

1378 *Evidence of title and seizin* may be proved by proof of the pernancy of the rents and profits of land, and of the exercise of acts of ownership over land, and the exercise of acts of ownership may be established by production of expired and ancient leases, or counterparts of leases, executed by deceased persons or their deceased lessees(*e*); and declarations of deceased occupiers of land, as to the parties under whom they held, are admissible in evidence to show who was the owner of the inheritance in their time(*f*). Entries by a deceased agent of the plaintiff charging himself with the receipt of money as

(*a*) Erle, C.J., Swan, *Ex parte*, 30 Law J., C. P. 118.

(*b*) *Re* Bahia & San Francisco Rail. Co., L. R. 3 Q. B. 584; 37 Law J., Q. B. 176. Hart *v.* Frontino & Bolivia Gold Mining Co., L. R., 5 Exch. 111. See *Re* London & Provincial Telegraph Co., L. R. 9 Eq. Ca. 653.

(*c*) Damerell *v.* Protheroe, 10 Q. B. 20.

(*d*) Evans *v.* Rees, 10 Ad. & E. 151.

(*e*) Doe *v.* Pulman, 3 Q. B. 622. And see, as to land-tax assessments being evidence of seizin, Doe *v.* Arkwright, 3 Ad. & E. 182.

(*f*) Peaceable *v.* Watson, 4 Taunt. 16. Doe *v.* Coulthred, 7 Ad. & E. 235.

rent are admissible for the same purpose, although the defendant does not claim through the person so proved to have paid rent(*g*).

1379 *Amendment of variances between the declaration of the cause of action and the proof adduced in support of it.*—By 3 & 4 Wm. 4, c. 42, s. 23, it is enacted, that any court of record in civil actions, or any judge at *nisi prius*, may cause the record, writ, or document on which any trial may be pending in a civil action, where any variance shall appear between the proof and the recital on the record, etc., of any contract, custom, prescription, name, or other matter, in any particular in the judgment of such court or judge not material to the merits of the cause, and by which variance the opposite party cannot have been prejudiced in the conduct of his action or defence, to be forthwith amended, on such terms as to payment of costs or postponing the trial as the court or a judge shall think reasonable; and in case such variance shall be in some particular in the judgment of such court or judge not material to the merits, but such as that the opposite party may have been prejudiced thereby in the conduct of his action or defence, then the same may be amended on the payment of costs to the other party, and withdrawing the record and postponing the trial as such court or judge shall think reasonable. The judge may, however, avoid (s. 24) the responsibility of deciding, by directing the jury to find the facts according to the evidence, and leave the question of the materialty of the evidence for the consideration of the court above.

In actions for libel and slander, the judge had power under this statute, if there was a variance between the libel or slander charged in the declaration and the writing adduced in evidence, or the words proved to have been uttered, to amend the variance, if the amendment did not create a new and different cause of action(*h*).

By the Common Law Procedure Acts, 15 & 16 Vict. c. 76, s. 222, 17 & 18 Vict. c. 125, s. 96, and 23 & 24 Vict. c. 126, s. 36, it is now further enacted, that it shall be lawful for the superior courts of common law, and every judge thereof, and any judge sitting at *nisi prius*, at all times to amend all defects and errors in any proceedings in civil causes, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not; and all such amendments may be made with or without costs, and upon such terms as to the court or judge may seem fit, and all such amendments as may be necessary for the purpose of

(*g*) Doe *v.* Stacey, 6 C. & P. 139.

(*h*) Smith *v.* Knowelden, 2 M. & Gr. 564. Southee *v.* Denny, 1 Exch. 196. Pater *v.* Baker, 3 C. B. 854.

determining in the existing suit the real question in controversy between the parties, shall be so made if duly applied for.

Under these statutes, where in a declaration for libel the substance only of the libel was set out, an amendment was allowed by the insertion of the actual letter verbatim, in which the libel was contained, with the words "meaning thereby" immediately preceding the statement or the substance of the libel in the declaration(*i*). So in an action for a false representation as to the takings of a public-house, an amendment that such takings were made chiefly over the counter, and not by out-door business, was allowed(*k*). So, where the question in dispute was to whom the freehold belonged, a count in trespass has been amended by turning it into a count for an injury to the plaintiff's reversion(*l*). So a statute omitted in the margin of a plea of not guilty by statute has been allowed to be added(*m*). And to a declaration for knowingly keeping a fierce and mischievous dog, an amendment by the addition of the words "and accustomed to bite mankind," has been allowed(*n*).

The power of amendment, however, given by these statutes is not confined to the amendment of variances, but enables the judge to amend by adding fresh plaintiffs in an action of ejectment(*o*), or a plea necessary for the trial of the substantial question between the parties, or to strike out a count, where, by an inadvertence, no issue had been joined thereon(*p*). Thus, in an action for injuries sustained by the negligent driving of the defendant, a plea that the person driving was not at the time of the accident in the employ of the defendant as his servant, has been allowed to be added(*q*). Whether or not the proposed amendment is necessary for the purpose of determining the real question in controversy between the parties, is a matter to be decided by the judge(*r*), but no amendment ought to be made which affords reasonable grounds of demurrer(*s*), or which alters the cause of action set forth on the face of the declaration into another and a different cause of action(*t*), unless it is manifestly necessary to determine the

(*i*) Saunders *v.* Bate, 1 H. & N. 402.
(*k*) Roles *v.* Davis, 4 H. & N. 484.
(*l*) May *v.* Footner, 5 Ell. & Bl. 595.
(*m*) Edwards *v.* Hodges, 15 C. B. 477.
(*n*) Worth *v.* Gilling, L. R., 2 C. P. 1.
(*o*) Blake *v* Done, 7 H. & N. 465; 31 Law J., Exch. 100; but not a fresh defendant, Garrard *v.* Glubelei, 11 C. B., N. S. 616; 31 Law J., C. P. 270.
(*p*) Berresford *v.* Geddes, L. R., 2 C. P. 265.
(*q*) Mitchell *v.* Crassweller, 13 C. B. 239.
(*r*) Wilkin *v.* Reed, 15 C. B. 205; 23 Law J., C. P. 198.
(*s*) Martyn *v.* Williams, 1 H. &. N. 817.
(*t*) Bradworth *v.* Foshaw, 10 W. R. 760.

real question which both parties came to try(*u*). Thus, an action for money lent may be altered into an action for a false representation of authority, where that is the real cause of action(*x*). But in an action for fraudulent misrepresentation as to the defendant's reason for dismissing his clerk, in which it appeared that the clerk had as a fact been guilty of dishonesty while in the defendant's service, but that he was not dismissed for that reason, an amendment to the effect that the defendant fraudulently omitted to mention the fact of the clerk's dishonesty was disallowed, the question to be tried on the declaration as it stood being, whether the defendant assigned the right reason for dismissing him(*y*). Nor will a count in trespass or trover by one tenant in common against another be allowed to be altered into a count for an account under 4 Anne, c. 16, s. 26(*z*).

1380 *Admissions of liability.*—Admission of parties under a misapprehension of the responsibility which the law would cast upon them, is not such an admission as can be used with effect against them(*a*). When a man, to prevent litigation, and by way of compromise, expresses a willingness to pay a sum of money, such conduct does not fairly raise an admission of such a liability as will make him answerable in law. Statements made to purchase peace and stave off litigation do not necessarily evince a consciousness of liability(*b*).

1381 *Illness of witness.*—The deposition or examination of a witness on interrogatories, unable to attend a trial from "permanent" sickness, is made admissible by 1 W. 4, c. 22, s. 10, if the judge is satisfied by such evidence as he shall think fit of the sickness, and it is only necessary that the sickness shall be so far permanent as to prevent the witness being able to attend within any reasonable time(*c*).

(*u*) May *v.* Footner, *supra*.
(*x*) Richardson *v.* Williamson, *ante*, p. 1026.
(*y*) Wilkin *v.* Reed, *supra*.
(*z*) Jacobs *v.* Seward, L. R., 5 Engl. & Ir. App. 464.
(*a*) Ld. Tenterden, Bradley *v.* Waterhouse, 3 C. & P. 321.
(*b*) Bull. N. P. 236b, 7th ed.
(*c*) Beaufort (Duke of) *v.* Crawshay, L. R., 1 C. P. 639.

CHAPTER XXII.

OF THE DAMAGES AND COSTS RECOVERABLE IN ACTIONS EX DELICTO.

SECTION I.—*Of damages recoverable in actions ex delicto.*—Assessment of damages in actions *ex delicto*—When special and extraordinary damages are recoverable as the natural or necessary consequences of the wrongful act—Damages too remote, and not naturally resulting from the wrong done—Expense of obtaining legal advice not recoverable—Costs of previous legal proceedings when recoverable—Damages which the plaintiff has become liable to pay through the default of the defendant—Prospective damages—Exemplary and vindictive damages—Evidence in aggravation and mitigation of damages—Recovery of damages from one of several co-trespassers—Damages when the plaintiff has insured against loss—Double and treble damages—New trial on the ground of excessive or small damages—Quashing of inquisitions of damages.

SECTION II.—*Recovery of costs in actions ex delicto.*—Award of costs to the successful party—Costs of pleas *puis darrein continuance*, or stay of proceedings, arrest of judgment, etc.—When the court has no jurisdiction it has no power to award costs—Effect on costs of withdrawing a juror—Costs in actions of slander and libel—When the certificate of a judge or presiding officer is necessary to enable the plaintiff to recover costs—Certificate that the action was brought to try a right—County court acts depriving a plaintiff of his costs—Certificates for costs, and rule, or order for costs, under these statutes—Costs on references—Certificate for full costs in cases of wilful and malicious trespass—Full costs after notice not to trespass—Costs in actions for wilful and malicious grievances—Costs in actions against justices, constables, and others, in respect of things done under statutory powers—Costs in actions against executors—In actions upon judgments—New trials, appeals, removals by certiorari, prohibition, indictment, mandamus, and injunction—Double costs—Taxation of costs—Costs in the county court.

SECTION I.

OF DAMAGES RECOVERABLE IN ACTIONS EX DELICTO.

1382 *Of the assessment of damages in actions ex delicto.*—In actions of tort a greater latitude is allowed by the court to a jury in the assessment of damages than is allowed in actions of contract(*a*). "The damages must be excessive and outrageous to warrant a new trial"(*b*); "for it is not to be expected that a jury will measure their verdict so nicely as in cases of contract"(*c*). Therefore, where some printer's devils, who had been unlawfully imprisoned for six hours, brought their several actions, and the jury gave each of them 300*l.* damages, the court declined to meddle with the verdict, although it was proved that each of the plaintiffs had been civilly treated and fed upon beefsteaks and porter during the period of their imprisonment(*d*). "If the jury," observes Pratt, C.J., "had been confined by their oath to consider the mere personal injury only, perhaps 20*l.* damages would

(*a*) De Grey, C.J., Sharpe *v.* Brice, 2 W. Bl. 942. The rule of damages should not depend on the form of the action. In civil actions the law awards to the party injured a just indemnity for the wrong which has been done him, and no more, whether the action be in contract or tort. Except in those special cases where punitory damages are allowed, the inquiry must always be what is an adequate indemnity to the party injured, and the answer to that inquiry cannot be affected by the form of the action in which he seeks his remedy. Baker *v.* Drake, 53 N. Y. 211.

But while the rule of damages in civil actions ought not to depend upon the form of the action, the rule of damages in actions *ex contractu* is applicable in actions *ex delicto* only where elements of certainty exist by which substantial compensation may be readily estimated, or where the action is only nominally in tort. The rule is not applicable in cases of actual aggressive tort where no such element of certainty exists, nor in those cases where the application of the rule would exclude a material portion of the damages the injured party may have suffered, though the amount of such damages may not be susceptible of accurate calculation by any fixed and definite rule. Allison *v.* Chandler, 11 Mich. 542.

Damages are of three kinds, nominal, compensatory and exemplary. Nominal damages are proper where any right has been invaded and no evidence is given of any particular amount of loss. Compensatory damages are given where no elements of oppression or malice enter into the commission of the offence, and are designed merely to furnish actual compensation for injury sustained. Exemplary damages are given whenever elements of oppression or fraud or malice enter into the commission of the offence; and in such cases the jury are not limited to the actual compensation, nor are they required to scrutinize very closely the amount of their verdict, but blending together the rights of the injured party and the interests of the community, they may give such a verdict as will compensate for the injury, and at the same time inflict some punishment upon the defendant for his wrongful act and protect society. Hendrickson *v.* Kingsbury, 21 Iowa, 379.

Punitive, vindictive, and exemplary damages are, in their legal acceptation, synonymous terms. Chiles *v.* Drake, 2 Met. (Ky.) 146. Hamilton *v.* Third Avenue R. R. Co., 53 N. Y. 25, 28.

(*b*) Huckle *v.* Money, 2 Wils. 205.

(*c*) Cresswell, J., Williams *v* Currie, 1 C. B. 848. Fabrigas *v.* Mostyn, 2 W. Bl. 928. Peterson *v.* Gresham, 25 Ark. 381. Wheaton *v.* North Beach, etc., R. R. Co., 36 Cal. 590.

(*d*) Huckle *v.* Money, 2 Wils. 205.

have been thought sufficient; but the small injury done to the plaintiff, or the inconsiderableness of his station and rank in life did not appear to the jury in that striking light in which the great point of law touching the liberty of the subject appeared to them at the trial."

The court will not in gereral interfere with the damages unless the finding has proceeded from some mistake; or the jury have acted from some sinister feeling, and the judge is dissatisfied with their verdict(*e*). If the jury give the plaintiff more damages than by his own showing he ought to recover(*f*), or if there be several counts in the declaration, and a verdict is entered generally on all the counts, and entire damages are given, and one count is bad, the damages so assessed cannot be recovered, and a *venire de novo* must be awarded(*g*). If an action of slander be brought for words spoken at different times, and the action will not lie for the words spoken at one time, but will lie for words spoken at another, and a verdict is found for all the words, and entire damages are assessed, no judgment will be given(*h*); but when words are all spoken at one time, and some of them are actionable and some not, and damages are assessed generally, they shall be intended to be given only for those words which are actionable, and it shall be presumed that the others were inserted only for aggravation(*i*).

1383 *Damages recoverable in particular actions.*—The damages recoverable in particular actions have already been in most cases considered under the headings of those actions(*j*).

Where a person has been induced, by false accounts of the transactions and profits of a joint-stock company, to buy shares therein, and give for them a sum far beyond their real value, the measure of damages is the difference between the actual value of the shares at the time of the purchase, and the fictitious value imparted to them by the false representation(*k*).

(*e*) Wallington *v.* Wood, C. P. Nov. 8th, 1860. Britton *v.* S. W. Rail. Co., 27 Law J., Exch. 385; see *post*, NEW TRIALS. Wheaton *v.* North Beach. etc., R. R. Co., 36 Cal. 590. Wightman *v.* Providence, 1 Cliff. Ct. Ct. 524. Illinois, etc., R. R. Co., *v.* Simmons, 38 Ill. 242. Kennedy *v.* North Missouri R. R. Co., 36 Mo. 351. Ross *v.* Innis, 35 Ill. 487. Boyce *v.* California Stage Co., 25 Cal. 460. St. Paul *v.* Kerby, 8 Minn. 154. Letton *v.* Young, 2 Met. (Ky.) 558.

(*f*) Hambleton *v.* Veere, 2 Wms. Saund. 170. White *v.* Cannada, 25 Ark. 41. But see Raymond *v.* Williams, 24 Ind. 416; Webb *v.* Thompson, 23 Ind. 423.

(*g*) Grant *v.* Astle, Doug. 730. Leach *v.* Thomas, 2 M. & W. 427.

(*h*) Popham, J., Brooke *v.* Clarke, Cro. Eliz. 328. Jaxon *v.* Tanner, Cro. Car. 237.

(*i*) Penson *v.* Gooday, ib. 327. Thaxbie *v.* Smith, Cro. Eliz. 788. Berkeley *v.* Earle of Pembroke, Moore, 706. Broughton's case, ib. 708.

(*j*) As to damages in an action by a judgment creditor against a sheriff for an escape, see Hemming *v.* Hale, 29 Law J., C. P. 137; but imprisonment for debt is now abolished.

(*k*) Davidson *v.* Tullock, 3 Macq. 783; *ante*, p. 1009. Bowman *v.* Parker, 40 Vt. 410.

In actions for deceit, the measure of damages is the difference of value between the thing sold as represented to be and as it was. Stetson *v.* Croskey, 53 Penn. St. 250. Morton *v.* Scull, 28 Ark. 289.

As against a manifest wrong-doer, a jury is, as we have seen, justified in making the strongest presumptions, so that if an article of value, such as a diamond necklace, has been taken away, and part of it is traced to the possession of the defendant, the jury may reasonably infer that the whole thing has come into his hands, and give damages accordingly(*l*). Where the plaintiff, by his own dealings and acts, renders the nature of his interest in the property and the extent of the damages altogether doubtful, he may vacate his whole claim, or destroy his right to more than nominal damages(*m*).

1384 *Special and extraordinary damages.*—All damages which ordinarily and in the natural course of things might fairly be expected to result, and have resulted, from the commission of the wrongful act, are recoverable, provided they are claimed by the plaintiff in his declaration(*n*). If by reason of the defendant's negligence and breach of duty the property of the plaintiff has become deteriorated and reduced in value by rain, storm, or frost, or any destructive agencies of ordinary occurrence, the plaintiff will be entitled to recover all the damages he has sustained thereby(*o*). All persons are responsible for all the natural consequences resulting from acts done by them in violation of the rights of others. The jury are entitled to look into all the circumstances and at the conduct of both parties, and see where the blame is, and what ought to be the compensation according to the way the parties have conducted themselves(*p*). Where the plaintiff has been compelled to pay money to release himself from the injurious consequences naturally resulting from the wrongful act of the defendant, such money is recoverable from the defendant as part of the damages. See *ante*, p. 735.

Whenever one person commands or authorizes an act to be done by another, he is responsible for all that the other does in the necessary execution of his authority. If, therefore, an assault and imprisonment of the plaintiff are the necessary or probable consequence of orders given by the defendant, the defendant will be responsible in damages for such assault and imprisonment, although he did not directly order it, or contemplate the possibility of its occurrence(*q*).

In an action for breaking and entering the plaintiff's dwelling-house,

(*l*) Mortimer *v.* Cradock, *ante*, p. 459.
(*m*) *Ante*, p. 461. Pringle *v.* Taylor, 2 Taunt. 150.
(*n*) Pollock, C.B., Rigby *v.* Hewitt, 5 Exch. 242. Workman *v.* Gt. North. Rail. Co. 32 Law J., Q B. 79. Gilbertson *v.* Richardson, 5 C. B. 502. Alston *v.* Huggins, 3 Brevard, 105.
(*o*) Smeed *v.* Foord, 28 Law J., Q. B. 178.
(*p*) Davis *v.* North-West. Rail. Co., 7 W. R. 105. Collard *v.* S. E. Rail. Co., 7 H. & N. 79.
(*q*) Glynn *v.* Houston, 2 M. & Gr. 337.

and assaulting and beating him, Lord Ellenborough allowed the plaintiff to give evidence that his wife was so terrified by the conduct of the defendant that she was immediately taken ill and died soon afterwards, not as a substantive ground of damage, but for the purpose of showing how outrageous and violent had been the conduct of the defendant(*r*). "But I entertain considerable doubt," observes Pollock, C.B., "whether a person who is guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated"(*s*).

1385 *Damages too remote, and not naturally resulting from the wrong done(t).*—Where a passenger on board ship was assaulted and imprisoned for one night by the captain, and in consequence thereof took the first opportunity of leaving the ship, and paid 100*l.* for his passage home in another vessel, it was held that, in order to recover the 100*l.* as part of the damages for the assault and imprisonment, it was necessary for the plaintiff to prove that there was fair and reasonable ground for fearing a renewal of the ill-treatment, and that he left the vessel under the influence of such fear, and not merely because he was angered and displeased with the captain, and could not continue on board with ease and comfort(*u*).

1386 *Damages in actions of tort founded on contract.*—When the action of tort is founded on a breach of contract, the damages recoverable are those which may fairly and reasonably be considered to arise naturally, according to the usual course of things, from the breach of contract itself, or which may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. If special circumstances exist which render the neglect or breach of duty productive of more than ordinary injury and damage to the plaintiff, such special circumstances must have been communicated to the defendant in order to make him responsible for the special and extraordinary damages resulting from any neglect or breach of duty on his part(*x*). A man

(*r*) Huxley *v.* Berg, 1 Stark. 98. Bracegirdle *v.* Orford, 2 M. & S. 77.

(*s*) Greenland *v.* Chaplin, 5 Exch. 248.

(*t*) *Ante*, pp. 6-8. Walker *v.* Olding, 32 Law J., Exch. 142. Wilson *v.* Lanc. and York. Rail. Co., *ante*, p. 628.

(*u*) Boyce *v.* Bayliffe, 1 Campb. 58.

(*x*) Hadley *v.* Baxendale, 9 Exch. 354. Portman *v.* Middleton, 4 C. B., N. S. 322; 27 Law J., C. P. 231. Theobald *v.* Rail. Pass. Ass. Co., 10 Exch. 45. Peterson *v.* Ayre, 13 C. B. 353. Passinger *v.* Thornburn, 34 N. Y. 634.

cannot, by merely changing the form of his action, entitle himself to recover greater damages than those to which he is by law entitled according to the true facts of the case and the real nature of the transaction(*y*).

1387 *Expense of obtaining legal advice.*—The expense incurred by a plaintiff in consulting an attorney and obtaining a legal opinion upon the validity of his claim, is not recoverable as a part of the damages. "Parties must do what they think is right, and the expense of getting the experience of attorneys to advise is not to be repaid by the other party. Nothing of that sort can be allowed in damages, and everything of that nature that a plaintiff is entitled to will be allowed in the taxation of costs"(*z*).

1388 *Costs of previous legal proceedings.*—A defendant in an action *ex delicto* is responsible in damages, as we have seen, for the natural and ordinary consequences of the wrong done. Where, therefore, the defendant, who was employed as architect to superintend the building of a church, ordered stone for the church from the plaintiffs in *A's* name, and on his account, and the plaintiffs supplied the stone, and afterwards sued *A* for the price, but failed in their action, and had to pay *A's* costs and the costs of their own attorney, because it was proved at the trial that the defendant had received no authority from *A* to order the stone in his name, and the plaintiffs then brought an action against the defendant to recover the damages they had sustained by reason of his false assumption of agency and pretence of authority for the order he gave, it was held that the plaintiffs were entitled to recover from the defendant not only the value of the stone ordered by him in *A's* name, but also the costs they had incurred and paid in the former action(*a*). So where a land agent professed to have authority from a landowner to let land, and signed an agreemant for a lease, and the landowner repudiated the lease and denied the authority, and the intended tenant, relying on the representation of the agent, filed a bill in Chancery against the landowner for a specific performance of the agreement, and notice of the suit was given to the agent, and the latter failed to withdraw his assertion of authority, he was held liable to pay the costs of the Chancery suit(*b*). But no person relying on a pretended author-

(*y*) Chinery *v.* Viall, 5 H. & N. 295. Johnson *v.* Stear, 33 L. J., C. P. 130.

(*z*) Clare *v.* Maynard, 7 C. & P. 743. Earl *v.* Tupper, 45 Vt. 275. Hoadley *v.* Watson, 45 Vt. 289.

(*a*) Randell *v.* Trimen, 18 C. B. 786; 25 Law J., C. P. 307. Richardson *v.* Dunn, 8 C. B., N. S. 655; 30 Law J., C. P. 47.

(*b*) Collen *v.* Wright, 7 Ell. & Bl. 311; 8 Ib. 647, in error; 26 Law J., Q. B. 147; 27 Ib. 215. Hughes *v.* Graeme, 33 Law J., Q. B. 335. Spedding *v.* Nevell, *ante*, p. 1042.

ity of this sort ought in prudence to take legal proceedings against the supposed principal without giving notice to the pretended agent, and giving him an opporunity of withdrawing or verifying his assertion of authority(*c*).

Where a tenant gave his landlord notice to quit, and then refused to give up possession, it was held, as we have seen, that the landlord was entitled to recover the costs of an action brought against him by a person to whom he had contracted to let the premises, but to whom he was unable to give possession in consequence of the re usal of the tenant to go out pursuant to his notice. "The letting to a new tenant," observes Cockburn, C.J., "is the ordinary course of dealing on the part of an owner of land under such circumstances. The defendant, therefore, must have understood, that when the plaintiff gave him notice to quit he would enter into a new contract with a new tenant to let the premises to him from the expiration of such notice. And in this case the tenant was apprised of the fact that the landlord had relet the premises, and was consequently aware of the inconvenience and loss he was exposing him to by his improper conduct"(*d*).

In an action for running down a ship, in which it appeared that the plaintiff had been obliged, in consequence of the injury, to employ a steam tug, the owners of which demanded 150*l.* for salvage, and commenced a suit in the Admiralty Court against the plaintiff, who paid 20*l.*, and the court ultimately decreed the payment of 45*l.*, with costs, to the salvors, and the plaintiff sought to recover these costs as part of the damage he had sustained, it was held that the proper question for the jury was, whether the plaintiff, in paying only 20*l.* into court, and risking the costs of the action, had pursued the course which a prudent and reasonable man would take in his own case, and that if the jury thought he had, the costs of the suit might be recovered(*e*).

If the buyer of a horse or a picture with a warranty, relying on the warranty, re-sells the horse or the picture with a warranty, and being sued thereon by his vendee, gives notice to the defendant of the action, and receives no direction from the latter to give up the cause, and proceeds to defend and is worsted, the costs and damages of the defence to that action are part of the damages which the plaintiff sustains by reason of the false warranty, and may be recovered by the plaintiff in an action against the defendant for damages for the breach

(*c*) Wightman, J., in Collen *v.* Wright, 26 Law J., Q. B. 151.
(*d*) Bramley *v.* Chesterton, 2 C. B., N. S. 605.
(*e*) Tindall *v.* Bell, 11 M. & W. 228.

of warranty(*f*). But if the plaintiff has made a rash and improvident defence, after having had an opportunity of ascertaining by examination that the warranty could not be supported, he will not be permitted to recover the costs of his defence(*g*); for "no person has a right to inflame his own account against another by incurring expenses in an unrighteous resistance to an action which he cannot defend with any prospect of success"(*h*). If the costs have been taxed, the taxed costs only can be recovered(*i*).

If the costs incurred in legal proceedings are not part of the consequences of the wrong done(*j*), or if they do not naturally result from the breach of any warrant of authority, or if they are the remote, unexpected and unusual consequence of the wrong, such as costs incurred in upholding a defence which is manifestly wholly untenable(*k*), they are not recoverable(*l*).

1389 *Recovery of damages which the plaintiff has become liable to pay through the default of the defendant.*—A liability on the part of the plaintiff to pay damages to a third party, by reason of the default of the defendant, is enough, as we have seen, to enable the plaintiff to recover those damages from the defendant. It is not necessary that the money itself should be actually paid. Thus, where the defendant sold barley to the plaintiff, warranted to be chevalier seed-barley, and the plaintiff resold it with a similar warranty, and the barley was not chevalier seed-barley, and the sub-purchaser claimed damages from the plaintiff, whereupon the plaintiff fell back upon the defendant and sued him for these damages, it was held, as we have seen (*ante*, p. 1046), that he was entitled to recover them, although he had not actually paid them to the sub-purchaser. "I consider," observes Crompton, J., "that it was not necessary that there should be a payment before the right to recover these damages accrued, and that the jury may well calculate all the mischief which, according to the breach of contract, might accrue to the plaintiff. This matter has been a good deal discussed in

(*f*) Lewis *v.* Peake, 7 Taunt. 152. Pennell *v.* Woodburn, 7 C. & P. 118. Randall *v.* Raper, 27 Law J., Q. B. 266; Ell. Bl. & Ell. 84. In an action to recover damages for the breach of a warranty that the signature of an indorser on a note, transferred to the plaintiff by the defendant, was genuine, the plaintiff may recover, as part of his damages, the costs of an unsuccessful suit against the supposed indorser, if such suit was brought in good faith, and on due notice to the defendant. Coolidge *v.* Brigham, 5 Met. 68.

(*g*) Wrightup *v.* Chamberlain, 7 Sc. 589.

(*h*) Ld. Denman, C.J., Short *v.* Kalloway, 11 Ad. & E. 31.

(*i*) Grace *v.* Morgan, 2 Sc. 793. But see per Martin, B., in Howard *v.* Lovegrove, L. R., 6 Exch. 45.

(*j*) Holloway *v.* Turner, 6 Q. B. 928.

(*k*) Ronneberg *v.* Falkland Islands Co., 34 Law J., C. P. 34.

(*l*) Pow *v.* Davis, 1 B. & S. 220; 30 Law J., Q. B. 256. Richardson *v.* Dunn, 8 C. B., N. S. 655; 30 Law J., C. P. 44; *ante*, pp. 6-8.

cases of special damage, and it has been usual to give in evidence the amount of the bills sent in by surgeons and attorneys, but it has never been said that the liability to pay is not enough to enable the plaintiff in an action of that kind to recover, and from the very nature of the thing here the amount of damages is ascertainable from the kind of crop which grows up. Then, another reason for so holding is, that according to the principle upon which damages are assessed they are only to be assessed once, and therefore the jury ought to take all these circumstances into consideration in estimating the amount of damages to which the plaintiffs are entitled"(*m*).

1390 *Medical expenses—Physician's fees.*—Where the plaintiff had been wounded by the negligence of the defendant in the management of a gun, and had employed a surgeon and physician for the cure of the injury he had sustained, Lord Ellenborough told the jury, that as to the surgeon's bill they were to consider the amount as paid by the plaintiff, since the surgeon could compel the payment of it as a legal debt, but that the physician's fees could not be taken into account, since they had not been actually paid, and the physician could not enforce payment by action(*n*).

But where the declaration alleged an actual payment of the charges of a third person, the allegation was held material, and necessary to be proved in order to enable the plaintiff to recover the amount of them(*o*).

1391 *Prospective damages*(*p*).—Although a plaintiff is not to be compensated for uncertain and doubtful consequences which may never ensue, yet he is entitled to compensation for losses which will "almost to a certainty happen." The jury may take into their consideration, in making up their minds on the damages, losses which will in all probability be sustained by the plaintiff; for "when the cause of action is complete, when the whole thing has but one neck, and that neck has been cut off by the act of the defendant, it would be most mischievous to say—it would be increasing litigation to say—you shall not have all you are entitled to in your first action, but you shall be driven to bring a second, a third, or a fourth action for the recovery of your damages"(*q*).

(*m*) Randall *v.* Raper, *supra*. Spark *v.* Heslop, 28 Law J., Q. B. 197. Dingle *v.* Hare, 29 Ib. C. P. 143. Addison on Contracts, 6th ed. 1054, *et seq.*

(*n*) Dixon *v.* Bell, 1 Stark. 289. Loosemore *v.* Radford, 9 M. & W. 657. Spark *v.* Heslop, 28 Law J., Q. B. 197.

(*o*) Jones *v.* Lewis, 9 Dowl. P. C. 150. Pritchet *v.* Boevey, 1 Cr. & M. 778.

(*p*) See *ante*, pp. 255, 256, 735.

(*q*) Best, C.J., Richardson *v.* Mellish, 2 Bing. 240. See Fetter *v.* Beal, *ante*, p. 724; Hodsoll

In estimating the damages in an action for a libel against a trader, the jury may take into consideration the prospective injury which will probably accrue to the trader from the publication of the libel(*r*). It has been said that the damage sustained at the time of the commencement of the action is all that the plaintiff can recover, and that the jury cannot take into account the prospective injury; but "it appears to me," observes Bosanquet, J., "that the jury were warranted in proportioning the damages to the amount of injury that would naturally result from the act of the defendant, though it might not affect him until a subsequent period"(*s*). And the jury may, it seems, give damages for the mental suffering arising from the apprehension of the future consequences of the publication of the libel(*t*).

1892 *Exemplary and vindictive damages.*—We have already seen that in actions of tort the damages are left very much to the discretion and judgment of the jury; and in all cases of malicious injuries and trespasses accompanied by personal insult, or oppressive and cruel conduct, juries are told to give what are called exemplary damages, although the actual personal injury, measured by any pecuniary standard, may be but small. "It tends," observes Heath, J., "to prevent the practice of duelling, if juries are permitted to punish insult by exemplary damages. I remember a case where a jury gave 500*l.* damages for knocking a man's hat off, and the court refused a new trial"(*u*). "Where," observes Gibbs, C.J., "a man is disposed to disregard every principle which actuates the conduct of a gentleman, what is to restrain him except large damages?"(*x*). So, where an action was brought by the plaintiff for the seduction of his daughter, and damages were recovered, and a motion for a new trial was grounded on circumstances showing the damages to be excessive, Wilmot. C.J., stated that "actions for seduction are brought for *example's* sake; and although the plaintiff's loss in this case may not

v. Stallebrass, *ante*, p. 1105. In actions for the recovery of damages arising from a single wrongful act the plaintiff is entitled to recover not only the damages which had been actually sustained up to the time of the trial, but also compensation for all damages resulting from the injury, whether present or prospective. The limit in respect to future damages is that they must be such as it is reasonably certain will inevitably and necessarily result from the injury. W. T. Filer *v.* New York Central R. R. Co., 49 N. Y. 42. Drew *v.* Sixth Avenue R. R. Co., 26 N. Y. 49. Curtis *v.* Rochester and Syracuse R. R. Co., 18 N. Y. 534. Stille *v.* Jenkins, 3 Green (N. J.), 302.

(*r*) Gregory *v.* Williams, 1 C. & K. 568. True *v.* Plumley, 36 Me. 466.

(*s*) Ingram *v.* Lawson, 8 Sc. 477.

(*t*) Goslin *v.* Corry, 8 Sc. N. R. 25. See Randall *v.* Raper, *ante*, p. 1190. Lawrence *v.* Gt. North. Rail. Co., and Bagnall *v.* London and N.-West. Rail. Co., *ante*, p. 906.

(*u*) Merest *v.* Hervey, 5 Taunt. 442; *ante*, pp. 381, 733.

(*x*) 5 Taunt. 441.

really amount to the value of 20s., yet the jury have done right in giving liberal damages"(*y*).

Wherever the wrong or injury is of a grievous nature, done with a high hand, or is accompanied with a deliberate intention to injure, or with words of contumely and abuse, and by circumstances of aggravation, the jury are authorized in giving, and may be told to give, vindictive damages(*z*). Thus, where in an action against a colonel of militia for ordering the plaintiff, a common soldier, to be whipped, it appeared that the colonel had acted unjustifiably and illegally, and out of mere spite and revenge, and the jury gave 150*l.* damages, and a new trial was moved for on the ground that the man appeared to

(*y*) Tullidge *v.* Wade, 3 Wils. 18. And see Huckle *v.* Money, *ante*, p. 1184.

(*z*) Thomas *v.* Harris, 27 Law J., Exch. 353. Willes, J., Bell *v.* Mid. Rail. Co., 10 C. B., N. S. 337; 30 Law J., C. P. 281. Emblen *v.* Myers, 6 H. & N. 54; 30 Law J., Exch. 71. Goddard *v.* Grand Trunk R. R. Co., 57 Me. 202. Railroad *v.* Hurst, 36 Miss. 660. Welch *v.* Durand, 36 Conn. 182. Baltimore, etc., R. R. Co. *v.* Bloeher, 27 Md. 277. Ousiy *v.* Hardin, 23 Ill. 403. Philadelphia, Wilmington & Baltimore R. R. Co. *v.* Quigley, 21 How. (U. S.) 202. Heirn *v.* M'Caughan, 32 Miss. 17.

A jury may award exemplary damages for injuries resulting from gross negligence. Hopkins *v.* Atlantic & St. Lawrence R. R. Co., 36 N. H. 9. Whipple *v.* Walpole, 10 N. H. 130. Taylor *v.* Grand Trunk R. R. Co., 48 N. H. 304. Welch *v.* Durand, 36 Conn. 182. Pickett *v.* Crook, 20 Wis. 358. Frink *v.* Coe, 4 Greene (Iowa), 555. Cochran *v.* Miller, 13 Iowa, 128. Vicksburg & Jackson R. R. Co. *v.* Patton, 30 Mo. 156. Kountz *v.* Brown, 16 B. Mon. (Ky.) 577.

In actions of trespass, where the injury was wantonly inflicted. Green *v.* Craig, 47 Mo 90. Ellsworth *v.* Potter, 41 Vt. 685. Hawk *v.* Ridgway, 33 Ill. 473. Best *v.* Allen, 30 Ill. 30. Pike *v.* Dilling, 48 Me. 539. Dorsey *v.* Manlove, 14 Cal. 553. Nagle *v.* Mullison, 34 Penn. St. 48. Champion *v.* Vincent, 20 Texas, 811.

In actions of replevin, where there has been an outrage in the taking, or vexation or oppression in the detention. Herdic *v.* Young, 55 Penn. St. 176. In actions for malicious prosecution. Callahan *v.* Caffarata, 39 Mo. 136. In actions for fraud. Oliver *v.* Chapman, 15 Texas, 400. In actions for assault and battery, where no provocation was given. Hendrickson *v.* Kingsbury, 21 Iowa, 379. Pike *v.* Dilling, 48 Me. 539. Foote *v.* Nichols, 28 Ill. 486. Roberts *v.* Mason, 10 Ohio (N. S.), 277. Birchard *v.* Booth, 4 Wis. 67. Porter *v.* Seiler, 23 Penn. St. 424. Reeder *v.* Purdy, 48 Ill. 261. But see Mooney *v.* Kennett, 19 Mo. 551. In actions for malicious abuse of process, where actual malice is shown. Barnett *v.* Reed, 51 Penn. St. 190. Lowder *v.* Hinson, 4 Jones' Law (N. C.), 360. In actions for false imprisonment. Brown *v.* Chadsey, 39 Barb. 253. In actions on the case for deceit. Nye *v.* Merriam, 35 Vt. 438. In actions by a father for the seduction of his daughter. Stevenson *v.* Belknap, 6 Clarke (Iowa), 97. And in many other actions, as we have seen, where a wrong of a grievous nature has been done with a high hand, with deliberate intention to injure, with words of insult and abuse, or with such reckless negligence as to be equivalent, in legal contemplation, to actual malice.

But it is not the form of the action that gives the right to the jury to give punitory damages, but the moral culpability of the defendant. It is only to cases of moral wrong, recklessness or malice that the law uses the suit of a private person as an instrument of public protection; and while a party who unintentionally violates the legal rights of another is civilly liable for all the damages resulting from the injury done, he is not liable in exemplary damages for doing what he honestly believes to be his duty. Hamilton *v.* Third Avenue R R. Co., 53 N. Y. 25. McCall *v.* McDowell, 1 Abb. (U. S.) 212.

And it may be laid down as a general rule that either malice, violence, fraud or oppression must be shown to have mingled in the acts complained of to warrant a jury in finding a verdict for exemplary or punitive damages. New Orleans, etc., R R. Co. *v.* Statham, 42 Miss 607. Allison *v.* Chandler, 11 Mich. 542. Nagle *v.* Mullison, 34 Penn. St. 48. Blodgett *v.* Brattleboro', 30 Vt. 579. St. Peter's Church *v.* Beach, 26 Conn. 355. Biggs *v.* D'Aquin, 13 La. An. 21. Williams *v.* Reil, 20 Ill. 147.

have been moderately punished, and not much hurt, and that the damages were disproportioned to his sufferings, the court refused the application, because the man was scandalized and disgraced by such a punishment(*a*).

Wherever injury has been done to the fair fame, reputation, or character of the plaintiff, juries are generally invited to give, and are justified in giving, such a sum as marks their sense of the maliciousness or recklessness of the wrong-doer in offering the insult and injury; their belief in the groundlessness of the charge, and their desire to vindicate the character of the plaintiff(*b*). Thus, in all actions of libel and slander, where the object of the plaintiff is to clear himself from aspersions that have been cast upon him, the jury are in the habit of giving large damages, with a view of vindicating the plaintiff's character from the aspersions cast upon it. And in an action for oral slander, where the cause of action rests upon special damage alleged and proved, the jury, in assessing their damages, are not limited to the amount of special damage proved, but may give their verdict for general damages, which would in their judgment be the natural and probable result of it. They must, however, as we have seen (*ante*, p. 963), exclude from their consideration damages resulting from the repetition of the slander by third parties who had no authority from the defendant to repeat it(*c*).

1393 *Evidence in mitigation of damages*(*d*).—Circumstances cannot be given in evidence in mitigation of damages where they would amount to a complete justification, and might have been pleaded as such; but where they fall short of a complete justification, and do not amount to a defence to the action, they may be given in evidence in mitigation of damages, as establishing a less aggravated case against the defendant(*e*). Thus, in an action for an assault and battery, the jury are not at liberty to take into consideration the circumstances that led to the assault, with a view to the reduction of the damages, if those circumstances amount to a justification, and could have been pleaded as

(*a*) Benson *v.* Frederick, 3 Burr. 1847. See Perrine *v.* Blanchard, 15 La. An. 133, as to the damages recoverable in an action against an officer for whipping the wrong person by mistake.

(*b*) Doe *v.* Filliter, 13 M. & W. 51. Guard *v.* Risk, 11 Ind. 156. Hunt *v.* Bennett, 19 N. Y. 173. Knight *v.* Foster, 39 N. H. 576. Symonds *v.* Carter, 32 N. H. 466. Snyder *v.* Fulton, 34 Md. 128. Cramer *v.* Noonan, 4 Wis. 231.

(*c*) Dixon *v.* Smith, 5 H. & N. 450; 29 Law J., Exch. 125. Evans *v.* Harries, 26 ib. 31. Allsop *v.* Allsop, 5 H. & N. 534.

(*d*) See *post*, p. 1198.

(*e*) Tindal, C.J., Perkins *v.* Vaughan, 7 Sc. N. R. 886. Speck *v.* Phillips, 7 Dowl. 470; 5 M. & W. 281. See *ante*, p. 993, note *m*.

such(*f*); but if they merely palliate the character of the offence and mitigate the wrong, they are admissible in evidence in reduction of the damages under the general issue(*g*).

In an action for assaulting the plaintiff and seizing his goods, it may be shown in mitigation of damages that the defendant was a custom-house officer, and that the plaintiff was going away from a vessel with goods liable to duty, without paying the duty, whereupon the defendant detained him and took possession of his goods; for this evidence does not amount to a complete justification, inasmuch as a custom-house officer cannot forcibly take goods from the person without a previous demand(*h*). Where the defendant gave the plaintiff in charge for stealing fat, and it appeared that there was no legal evidence of any felony, but the defendant *bonâ fide* believed that his fat had been stolen, and that the plaintiff had stolen it, and there was reasonable ground for his belief, Best, C.J., allowed the grounds of suspicion to be given in evidence in mitigation of damages(*i*).

In an action for libel or slander, where the plaintiff claims damages on the ground of the disparagement of his character, general evidence of the plaintiff's bad character prior to the publication of the libel is admissible in evidence, as we have seen, in reduction of the damages, but not evidence of the the truth of the words spoken, or anything which, if pleaded, would have amounted to a justification(*k*).

Where the defendant wrote a novel, and the plaintiff in reviewing it went beyond the bounds of fair criticism and libelled the defendant and his family, and the defendant thrashed the plaintiff, who brought an action for the assault, it was held that the libel might be given in evidence in mitigation of damages, although it was the subject of another action by the defendant against the plaintiff; but the jury were told that, as the defendant had chosen his remedy for the libel by his action for damages, he could not fairly be allowed to take much advantage of it in mitigation of damages in the action for the assault(*l*).

Where the plaintiff painted a picture, which he designated "The

(*f*) Watson *v.* Christie, 2 B. & P. 224.

(*g*) Linford *v.* Lake, 3 H. & N. 276; 27 Law J., Exch. 334. In all cases where the plaintiff may enhance the damages by showing circumstances of aggravation, the defendant may mitigate damages by showing circumstances of palliation. Millard *v.* Brown, 35 N. Y. 297. See Bohm *v.* Dunphy, 1 Mon. T. 333. Prentiss *v.* Shaw, 56 Me. 427. Tyson *v.* Booth, 100 Mass. 258.

(*h*) Ld. Denman C.J., De Gondouin *v.* Lewis, 10 Ad. & E. 120.

(*i*) Chinn *v.* Morris, 2 C. & P. 364.

(*k*) *Ante*, p. 993; Keilw. 203b. Dennis *v.* Pawling, Vin. Abr., EVIDENCE (1b), pl. 16. See *ante*, p. 1096.

(*l*) Fraser *v.* Berkeley, 7 C. & P. 625.

Beauty and the Beast," and caused it to be exhibited in Pall Mall for money, where crowds went to see it, and the defendant went and hacked the picture in pieces, and the plaintiff claimed the full value of the picture, and compensation for the loss of the exhibition, the defendant was permitted to show in mitigation of damages that the picture was a scandalous libel upon the defendant's brother and sister, and the exhibition of it a public nuisance. "If," observes Lord Ellenborough "this picture was a libel upon the persons introduced into it, the law cannot consider it valuable as a picture. Upon an appplication to the Lord Chancellor, he would have granted an injunction against its exhibition, and the plaintiff was both civilly and criminally liable for having exhibited it. The jury, therefore, in assessing the damages must not consider this as a work of art, but must award the plaintiff merely the value of the canvas and paint which formed its component parts"(*m*).

If a vendor has sold goods to a purchaser, and delivered them to him without payment of the price, and then, fearing that he never will be paid, goes and takes them out of the possession of the debtor, and the latter brings an action for damages, the jury cannot lawfully take into their consideration, in reduction or mitigation of the damages, the fact that the goods had not been paid for, and that there was reasonable ground to believe that the purchaser would never pay for them, as that would be equivalent to allowing a set-off of a debt in an action of trespass(*n*).

In actions for damages for seizing goods under irregular or void process, it is no ground for mitigation of damages that a regular judgment had been recovered against the plaintiff. Parties are not to extort even what is justly due by the improper execution of a warrant, and wherever goods are seized under process in a place to which the process does not run, the full value of the goods and all provable damage are recoverable(*o*).

1394 *Joint-trespasses—Recovery of damages from one of several co-trespassers.*—We have already seen, that where several persons commit a trespass in pursuit of one common design, each is answerable for the aggregate damage done by all(*p*). The jury cannot regularly assess several damages for one trespass with which the defendants are jointly charged; for though in fact one was more malicious and did greater

(*m*) Du Bost *v.* Beresford, 2 Campb. 511.
(*n*) Gillard *v.* Brittan, 8 M. & W. 575.
(*o*) Sowell *v.* Champion, 6 Ad. & E. 407. Edmondson *v.* Nuttall, 34 Law J., C. P. 102.
(*p*) Hume *v.* Oldacre, *ante*, p. 385. Clark *v.* Newsam, *ante*, p. 735.

wrong than the other, yet, all coming to do an unlawful act, the act of one is the act of all the parties present; and it is a rule of law, that what the plaintiff hath laid joint in his declaration, the jury cannot sever(*q*). Whenever, therefore, two or more persons are charged with a joint trespass, and both or all are found jointly guilty, the jury cannot afterwards assess several damages(*r*). The damages must be assessed against all jointly, though all may not have been equally culpable(*s*). Where an action of trespass was brought against three defendants, and two of them pleaded, and the other let judgment go by default, and several damages was given, thirty-five shillings against the two, and two shillings against the single defendant, the court held that the plaintiff might either take judgment of the thirty-five shillings, or enter a *remittitur*, but could not take the whole damages (thirty-seven shillings) assessed(*t*).

No contribution can be claimed as between joint wrong-doers. If, therefore, a plaintiff who has recovered judgment against two defendants for a joint trespass, levies the whole damages on one of them, that one has no claim for a moiety of the damage from the other(*u*).

1395 *Damages when the plaintiff has insured against loss, or has received full indemnity under a contract of insurance.*—Where a contract of insurance has been entered into, and a loss has been sustained by the assured for which he has received indemnity from the underwriters, and the assured has afterwards brought an action against the wrong-doer who occasioned the loss and recovered damages, the insurer or underwriter who has paid the amount of the loss may recover from the assured the amount of the damages he has received from the wrong-doer. Thus, the owner of goods who has intrusted them to a carrier, by land or by water, to be carried, and insures them against loss, and then sustains loss through the negligence of the carrier, is entitled to recover an indemnity on the contract of insurance, and also the full value of the goods from the carrier who has lost them; but he is not entitled to double satisfaction. As soon as he has received from the underwriter

(*q*) Brown *v.* Allen, 4 Esp. 158.

(*r*) Hill *v.* Goodchild, 5 Burr. 2791.

(*s*) Eliot *v.* Allen, 1 C. B. 18. Beal *v.* Finch, 11 N. Y. 128. Berry *v.* Fletcher, 1 Dill, 67. See Clark *v.* Bales, 15 Ark. 452; Hamilton *v.* Fulton, 28 Mo. 359; Carney *v.* Reed, 11 Ind. 417; Halsey *v.* Woodruff, 9 Pick. 555.

(*t*) Sabin *v.* Long, 1 Wils. 30.

(*u*) Merryweather *v.* Nixan, 8 T. R. 186. Farebrother *v.* Ansley, 1 Campb. 344. Percy *v.* Clary, 32 Md. 245. Rhea *v.* White, 3 Head (Tenn.), 121; Anderson *v.* Saylors, 3 Head (Tenn.), 551. Minnis *v.* Johnson, 1 Duval (Ky.), 171. Peck *v.* Ellis, 2 Johns. Ch. 131. Miller *v.* Fenton, 11 Paige, 18. As to the exceptions to the general rule, see Bailey *v.* Bussing, 28 Conn. 455; Acheson *v.* Miller, 2 Ohio (N. S.), 203; Moore *v.* Appleton, 26 Ala. 633.

or insurer the amount for which he has insured, he becomes a trustee for the latter in respect of any compensation paid or payable by the wrong-doer, and is bound to hand over to the insurer whatever money he receives from the wrong-doer over and above the actual loss he has sustained, after taking into account the amount he has received under the contract of insurance. The insurer, moreover, who has paid the loss, is entitled to sue in the name of the insured, for the purpose of recovering from the wrong-doer full compensation for the injury(*x*); and in such an action the court will not allow the sum received by the plaintiff on the policy of insurance to be given in evidence in reduction of damages. "If a plaintiff who has received full indemnity for his loss under a contract of insurance, could not recover from a wrong-doer, the latter," observes Tindal, C.J., "would take the benefit of a policy of insurance without paying the premium."

In an action for an injury done to the plaintiff's vessel from negligence in running it down at sea, the fact of the plaintiff's having received from the underwriters the amount of the loss was held to be no answer to the plaintiff's claim for damages(*y*). And where certain insurers had paid the amount of the loss occasioned by the demolition of a house by rioters, it was held that they might maintain an action in the name of the assured against the hundred, under the statute, to recover compensation for the injury(*z*).

1396 *Double and treble damages.*—Various statutes give, as we have seen, double and treble damages against persons who violate their provisions, such as the statutes prohibiting and punishing a forcible entry into lands and tenements(*a*); or the improper impounding of a distress(*b*); or the levying of a distress where no rent is due (*ante*, p. 656); or the rescuing a distress(*c*); or the taking by sheriff's bailiffs, their officers, deputies, etc., more than the appointed fees or recompense on execution (*ante*, pp. 801, 811, 812). In these cases, it should be ascertained at the trial whether the amount of damage assessed by the jury is the actual damage sustained, or the statutory damage of double or treble the actual damage; for if the jury assess the damages generally at a certain sum, and there is nothing on the record to show that the jury have found only the single value, the court cannot

(*x*) Randall *v.* Cockran, 1 Ves. sen. 97. Harding *v.* Townshend, 43 Vt. 536. Althorf *v.* Wolfe, 22 N. Y. 355.
(*y*) Yates *v.* Whyte, 5 Sc. 640; 4 B. N. C. 272.
(*z*) Mason *v.* Sainsbury, 3 Doug. 64. Clark *v.* Blything, 2 B. & C. 254; 3 D. & R. 489.
(*a*) 8 Hen. 6, c. 9; Dyer, 214a.
(*b*) 1 & 2 Ph. & M. c. 12, s. 1.
(*c*) 2 Wm. & M. sess. 1, c. 5, s. 4.

allow the matter to be explained by affidavit and the postea amended; for they are bound to conclude from the postea that the jury have taken into their consideration and have assessed all the damages that the plaintiff is entitled to recover. But if the jury find the actual or single damage expressly, then the plaintiff may come into court to have the judgment entered up for double or treble value according to the statute(*d*).

In the case of actions brought by the Crown for penalties of double or treble the amount of duty fraudulently kept back, the practice appears to be "for those who attend to the interests of the Crown to get the jury to find the actual amount of the duty which ought to have been paid, and then, without any further communication with them, to enter up judgment for double or treble the amount"(*e*). When the jury have by their verdict found only the single damage, the application to the court to increase the damages to the statutory amount should, it seems, be made within four days of the return of the jury process(*f*).

1397 *New trial on the ground of excessive and outrageous damages.*—"I should be sorry to say," observes Lord Mansfield, "that in cases of personal torts, no new trial should ever be granted for damages which manifestly show the jury to have been actuated by passion, partiality, or prejudice. But it is not to be done without very strong grounds indeed, and such as carry internal evidence of intemperance in the minds of the jury"(*g*). "I have always felt that it is extremely difficult to interfere, and say when damages are too large. You may take twenty juries, and every one of them will differ from 2000*l.* down to 200*l.* Nevertheless it is now well acknowledged in all the courts of Westminster Hall, that if the damages are clearly too large, the courts will send the inquiry to another jury. Where they interfere, they always go into all the circumstances, put themselves in the situation of the plaintiff and defendant, and examine closely into all their conduct"(*h*).

(*d*) Baldwyn *v.* Girries, Godb. 245. Sandford *v.* Clarke, 2 Chitt. 352. Buckle *v* Bewes, 4 B. & C. 154. Baker *v.* Brown, 2 M. & W. 199.

(*e*) Attorney-General *v.* Hatton, M'Clel. 216.

(*f*) Masters *v.* Farris, 1 C. B. 716.

(*g*) Gilbert *v.* Burtenshaw, Cowp. 230; Lofft, 771. Britton *v.* South Wales Rail. Co., 27 Law J., Exch. 355. See Peterson *v.* Gresham, 25 Ark. 381; Wightman *v.* Providence, 1 Clifford, Ct. Ct. 524; Renck *v.* McGregor, 3 Vroom (N. J.), 70; Wheaton *v.* North Beach, etc., R. R. Co., 36 Cal. 590; Ingerson *v.* Miller, 47 Barb. 47; Illinois, etc., R. R. Co. *v.* Simmons, 38 Ill. 242; Kennedy *v.* North Missouri R. R. Co., 36 Mo. 351; Ross *v.* Innis, 35 Ill. 487; Aldrich *v.* Palmer, 24 Cal. 513; Mayson *v.* Sheppard, 12 Rich. Law (S. C.), 254; Birchard *v.* Booth, 4 Wis. 67.

(*h*) Hewlett *v.* Cruchley, 5 Taunt. 281. Pym *v.* Gt. North. Rail. Co., 31 Law J., Q. B. 262. See Beggarly *v.* Croft, 31 Ga. 309.

"I think further," observes Ashhurst, J., "that before the court can set a verdict aside merely for excess of damages, they ought to be able to ascertain some rule by which the damages are to be measured, and to which the facts may be applied. Where damages depend in anywise upon calculation, the court have some medium to direct them by which they are enabled to correct any mistake of the jury. But where there is no such light to guide them, where the damage depends upon mere sentiment and opinion, the court have no line to go by; and, therefore, it would be very dangerous for us to interfere. We have no right in such a case to set up our own judgment against that of the jury, to which the constitution has referred the decision of the of the question of damages"(*t*).

But where there is any rule or guidance for the assessment of the damages, and the jury have not been properly directed on the point, or have disregarded the ruling of the judge, and have manifestly given excessive damages, the court will grant a new trial. So where the plaintiff has himself fixed the amount of damage and received it, and the jury give him a sum altogether disproportionate to his own estimate, the court will interpose and grant a new trial, unless the plaintiff consents to reduce the damages to a reasonable amount. Thus, where an importunate beggar having refused to quit the defendant's premises, the defendant ordered him to be apprehended by a constable, which was done, and he remained in custody one night at an inn, and was brought before the defendant the following morning, when he demanded compensation, and the defendant told him he might have two sovereigns or go before a justice, and the plaintiff consented to take the money, but said at the same time that he must have something for the keep of his horse, and the defendant then gave him half-a-crown, and directed the butler to give him some refreshment, and the butler did so, and the plaintiff went away, and then brought an action against the defendant, and, there being no plea of accord and satisfaction on the record, recovered a verdict with damages to the amount of 100*l*., it was held that the damages were enormous and disproportionate, on account of the limit which the plaintiff himself had put on his demand in the first instance. "It seems to me," observes Tindal, C.J., "that if accord and satisfaction had been pleaded, it would have been a bar to the action. A verdict of 100*l*.

(*t*) Duberly *v.* Gunning, 4 T. R. 656. St. Paul *v.* Kuby, 8 Minn. 154. Hinchman *v.* Whetstone, 23 Ill. 185. Goodall *v.* Thurman, 1 Head (Tenn.), 209. Stevenson *v.* Belknap, 6 Clarke (Iowa), 97.

is far beyond the merits, as we cannot but see, on the evidence of the plaintiff himself, who has set the measure on his own damages "(*k*).

Wherever the facts show that the plaintiff has taken upon himself to avenge his own wrongs, and to retaliate upon the defendant, these facts ought to be taken into consideration by the jury in reduction of damages; and if the jury have not been directed to do this, or have disregarded the direction, and have given excessive damages, the court will grant a new trial. Where an action was brought by a servant for an assault alleged to have been committed upon him by his master, and it appeared that the master had given the servant a slight blow for impertinent behavior, whereupon the servant turned upon his master and gave him a violent thrashing, and then brought an action for the original assault upon himself, and recovered 40*l.* damages, the court granted a new trial(*l*).

Where also the plaintiff himself has been guilty of misconduct in the matter of his complaint, and does not come into court with clean hands and a fair case for damages, and the circumstance has been overlooked by the jury, and excessive and disproportionate damages have been given, the court will allow the matter to be revised by another jury(*m*). And where a defendant against whom excessive damages have been recovered appears to have been acting in the discharge of some duty, or in the intended execution of an Act of Parliament, or in the *bond fide* exercise of some power or authority which he supposed that he possessed, and intended to act right, but by mistake did wrong, and the damages are manifestly out of all proportion to the injury actually sustained, the court will interfere and grant a new trial for the purpose of confining the damages within moderate and reasonable limits(*n*).

1398 *New trial on account of the smallness of the damages.*—A new trial will sometimes be granted in actions *ex delicto* for smallness of damages, when it appears that if the plaintiff is entitled to a verdict at all he is manifestly entitled to much greater damages than have been given by the jury. Thus, where it was proved that by reason of the defendant's negligence in driving an omnibus the plaintiff was run over and his thigh broken, and that the doctor's bill for setting his leg and attending upon him came to 10*l.* 5*s.* 6*d.*, and the jury gave the plaintiff

(*k*) Price *v.* Severn, 7 Bing. 319.
(*l*) Jones *v.* Sparrow, 5 T. R. 257.
(*m*) Buller J., in Duberley *v.* Gunning, 4 T. R. 653.
(*n*) Eliot *v.* Allen, 1 C. B. 40.

a verdict with a farthing damages, the court ordered a new trial(*o*). But where there is no standard for estimating the damages, and the court are unable to lay down any rule for the guidance of the jury, the court will not grant a new trial, although they may think the damages much too small(*p*).

1399 *Arrest of judgment where the plaintiff has a verdict for greater damages than he is legally entitled to.*—Whenever some of the damages claimed in the declaration are not legally recoverable, and damages are assessed generally, so that the plaintiff has recovered more damages than he ought, judgment will be arrested(*q*). Where the plaintiff declared against the defendant for seducing the plaintiff's apprentice from his service, and for the loss of the service of the apprentice for the whole residue of the term of apprenticeship, and the jury assessed the damages generally, and it appeard that the term was not expired, judgment was arrested on the ground that the plaintiff was not entitled to recover damages for all the term, as well for the time to come as for the time past, as claimed in the declaration; for the apprentice may return to his master and serve him for the residue of the term yet to come, or the master may compel the apprentice by law to serve him for the residue of the term, and the plaintiff ought not to have both the service and damages for the loss of it(*r*).

"The cases seem to establish this principle, that where it is positively and expressly averred in the declaration that the plaintiff has sustained damages from a cause subsequent to the commencement of the action, or previous to the plaintiff's having any right of action, and the jury give entire damages, judgment will be arrested; but where the cause of action is properly laid, and the other matter either comes under a *scilicet*, or is void, insensible, or impossible, and therefore it cannot be intended that the jury ever had it under their consideration, the plaintiff will be entitled to his judgment"(*s*).

The plaintiff can recover no more damages than he has claimed in

(*o*) Armytage *v.* Haley, 4 Q. B. 918.

(*p*) Strafford's case, cited 4 T. R. 655. See *ante*, p. 998, n. *h*. Under the Indiana Code inadequate damages in actions for injuries to the person or reputation will not be a ground for a new trial, but may be in other actions. Sharpe *v.* O'Brien, 39 Ind. 501.

For the practice under the Wisconsin statutes, see Emmons *v.* Shelden, 26 Wis. 648.

That inadequate damages are a ground for new trial in New York, see McDonald *v.* Walter, 40 N. Y. 551.

That inadequate damages are not a ground for new trial, see Phillips *v.* Phillips, 34 N. J. Law, 208; Shoff *v.* Wells, 1 Neb. 168. To the contrary, see Bishop *v.* Mayor of Macon, 7 Ga. 200.

(*q*) Prince *v.* Molt, 2 Salk. 663.

(*r*) Hambleton *v.* Veere, 3 Wms. Saund. 170.

(*s*) Hambleton *v.* Veere, 3 Wms Saund. 171 c, *in notis*.

s declaration, although the jury give him more, for he best knows e measure of his own wrong, and the amount of compensation to ich he is entitled. If, therefore, the jury give him more than he ims, he must relinquish the extra damages, or there will be error on e record(*t*).

Inquisition of damages before the sheriff.—When judgment has been suffered by default in an action of tort, a writ of inquiry must be issued for the summoning of a jury, and the assessment of the damages before the sheriff(*u*). The plaintiff must appear at the time and place appointed for the execution of the writ, and prove the amount of damages sustained by him; and he must be careful to confine his claim to matters which can lawfully be made a ground for compensation; for if he gives evidence of losses which are not the natural result of the injury of which he complains, and induces the jury to include in their verdict damages which are not legally recoverable, the court will set aside the inquisition(*x*), unless it appears that no objection was taken by the defendant, and that both parties mutually consented to take the verdict of the jury upon the matters submitted to them. It is the duty, however, of the sheriff to point out to the jury the true grounds and measure of compensation, and if he directs them wrongly, and they go beyond their authority, the court will interfere to set matters right.

SECTION II.

OF THE RECOVERY OF COSTS IN ACTIONS EX DELICTO.

1401 *Award of costs to a successful plaintiff in the superior courts.*—The expenses that a party has incurred in obtaining his right, such as the fees of counsel, the attorneys' bills, and the expenses of witnesses, are termed costs, and these are given by the court and taxed by their officer. "In contemplation of law the word damages emphatically includes costs. It is so considered by Lord Coke, and in various

(*t*) Cheveley *v.* Morris, 2 W. Bl. 1300. Roberts *v.* Muir, 7 Ind. 544. To the contrary see Webb *v.* Thompson, 28 Ind. 428; Raymond *v.* Williams, 24 Ind. 416.
(*u*) Chitt. Arch. Pr., INQUIRY.
(*x*) Penny, *In re*, 7 Ell. & Bl. 668; 26 Law J., Q. B. 225.

authorities. Costs, therefore, properly fall under the *nomen generale* of damages"(*y*).

By the statute of Gloucester, 6 Ed. 1, c. 1, there was no mode of giving a successful plaintiff his costs unless the jury assessed them, and included them in the amount of damages, but that statute enables the plaintiff to recover his costs, by the judgment of the court, in all cases where he recovers damages(*z*). And the 4 Anne, c. 16, which enabled defendants to plead several matters, enacts (s. 5) that if any such matter shall, upon demurrer joined, be judged insufficient, costs shall be given at the discretion of the court; or if a verdict shall be found upon any issue in the said cause for the plaintiff, costs shall be given in like manner, unless the judge who tried the issue shall certify that the defendant had a probable cause to plead such matter(*a*).

1402 *Costs to a successful defendant.*—By the 23 Hen. 8, c. 15, it is enacted, that if the plaintiff, in any action of detinue, or account, or upon the case, or upon any statute for any offence or personal wrong, should be nonsuited, or a verdict should pass against him, the defendant should have judgment to recover his costs against the plaintiff, to be assessed and taxed by the discretion of the judges of the court. And the 4 Jac. 1, c. 3, enacts (s. 2), that if any person shall commence any action of trespass or ejectment, or any other action whatsoever, wherein the plaintiff or demandant might have costs, in case judgment should be given for him, and the plaintiff or demandant nonsuited, or any verdict happen to pass against him, then the defendant shall have judgment to recover his costs against the plaintiff or demandant. This statute, therefore, gives a successful defendant his costs in all cases where the plaintiff, if successful, would be entitled to costs(*b*).

By 8 & 9 Wm. 3, c. 11, s. 1, it is further enacted, that where several persons shall be made defendants to any action or plaint of trespass, assault, or false imprisonment, and any one or more of them shall, upon the trial thereof, be acquitted by verdict, every person so acquitted shall recover his full costs of suit, unless the judge shall, immediately after the trial, in open court, certify upon the record under his

(*y*) Per Ld. Ellenborough, C.J., Phillips v. Bacon, 9 East, 208; Co. Litt. 257a. As to costs in error, see Parker v. Tootal, L. R., 1 Exch. 41, 115.

(*z*) Jackson v. Calesworth, 1 T. R. 72. As to costs in actions of ejectment, see New Pleading Rules, Hil. Term, 1853, R. 29, 30; 1 Ell. & Bl. Appendix, lxxxiii. Mobbs v. Vanden brande, 33 Law J., Q. B. 177. Cole on ejecment.

(*a*) As to costs under this statute, see Partridge v. Gardner, 4 Exch. 306. Howell v. Bodbard, ib. 311.

(*b*) Cobbett v. Wheeler, 30 Law J., Q. B. 64.

hand that there was reasonable cause for making such person a defendant. And (s. 2) that if upon any demurrer, either by the plaintiff or defendant, judgment shall be given against such plaintiff; or if, after judgment given for the defendant, the plaintiff shall sue a writ of error, and the judgment shall be affirmed, or the writ be discontinued, or the plaintiff shall be nonsuited therein, the defendant shall have judgment to recover his costs, and have execution for the same.

The 32nd section of 3 & 4 Wm. 4, c. 42, also enacts, that where several persons shall be made defendants, and any one or more of them shall have a *nolle prosequi* entered as to him or them, every such person shall recover his reasonable costs; and if a verdict shall pass for any one or more of them, every such person shall have judgment for and recover his reasonable costs, unless the judge shall certify that there was reasonable cause for making him a defendant. And by s. 34 it is enacted, that in all writs of *sci. fa.* the plaintiff, obtaining judgment on an award of execution, shall recover his costs upon a judgment by default, as well as upon a judgment after plea pleaded, or demurrer joined, and that where judgment shall be given either for or against a plaintiff, or for or against a defendant, upon demurrer in any action whatever, the successful party shall have his costs.

Where one of two defendants is struck out at the trial and the plaintiff obtains a verdict against the other, the ordinary course is to tax the whole costs of the action on each side and deduct from the plaintiff's costs a moiety of the costs of the defence(*c*).

1403 *Costs on pleas setting up matters of defence which have arisen since the last pleading.*—It seems that formerly, if a defendant pleaded *puis darrein continuance*, that pleading operated as a withdrawal of all other pleas, and the defence rested on this alone, so that the plaintiff had nothing but this one plea to traverse; and if he was obliged to confess this he could get no costs, because he could only get them under the statute of Gloucester by a judgment, and the defendant was entitled to judgment. But justice seemed to require that if the plaintiff was prosecuting a just claim up to a certain point, he ought to have his costs of suit up to that time, and the pleading rules made under statutory authority have accordingly given the plaintiff his costs up to the time of pleading the plea, if he admits the truth of it(*d*).

1404 *Costs on a stay of proceedings.*—Upon a summons to stay proceedings,

(*c*) Redway *v.* Webber, 18 C. B., N. S. 254.

(*d*) Reg. Gen. Trin. Term, 1853, R. 22, 23; 1 Ell. & Bl. App. lxxxii. Howarth *v.* Brown, 32 Law J., Exch. 99. Bennett *v.* Lond. & North-West. Rail. Co., 5 H. & N. 604; 29 Law J., Exch. 473.

on payment of a certain sum and costs, if the plaintiff refuses to take the amount offered in discharge of his claim, but afterwards accepts it, there is no absolute rule which entitles the defendant to his costs incurred subsequently to the summons(*e*).

1405 *Costs on arrest of judgment, or judgment non obstante veredicto.*—By the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, it is enacted (s. 145), that upon arrest of judgment, or judgment *non obstante veredicto*, the court shall adjudge to the party against whom such judgment is given the costs occasioned by the trial of any issues of fact arising out of the pleading, for defect of which such judgment is given, upon which such party shall have succeeded, and such costs shall be set off against any money or costs adjudged to the opposite party, and execution may issue for the balance, if any(*f*).

1406 *Where the court has no jurisdiction it has no power to give costs.*—When a case has been dismissed by a court of law for want of jurisdiction, the court cannot give judgment for costs(*g*), unless it is empowered so to do by express statutory authority(*h*). By the County Court Act, 9 & 10 Vict. c. 95 (s. 79), it is enacted, that if the plaintiff shall not make proof of his demand to the satisfaction of the court, it shall be lawful for the judge to nonsuit the plaintiff, or to give judgment for the defendant, and, in case where the defendant shall appear and shall not admit the demand, to award to the defendant by way of costs such sum as the judge shall think fit. It has been held that this enactment does not empower the judge to nonsuit and award costs when the case is out of his jurisdiction, for the plaintiff might be able conclusively to prove the cause of action brought before the court, but for the objection to the jurisdiction on the part of the defendant. Under such circumstances the court has merely power to declare its own incompetency to try the cause, and to direct that the suit shall abate, the plea to the jurisdiction being a plea in abatement of the suit. "We are of opinion," observes Pollock, C.B., "for the same reasons, that the provision over costs in the 88th section of the same Act only applies to cases within the jurisdiction of the county court to hear and determine"(*i*).

1407 *Effect on costs of withdrawing a juror.*—If on the trial of a cause a

(*e*) Walton *v.* Brown, 3 H. & N. 879.
(*f*) Whaley *v.* Laing, 5 H. & N. 480.
(*g*) Strader *v.* Graham, 18 How. Rep. Supreme Court, U. S. 602. Reg. *v.* Justices of Hampshire, 33 Law J., M. C. 47. Isle of Wight Ferry Co. *v.* Ryde Com., etc., 7 L. T. R., N. S. 391.
(*h*) 8 & 9 Wm. 3, c. 30, s. 3; 12 & 13 Vict. c. 45, s. 6.
(*i*) Lawford *v.* Partridge, 1 H. & N. 626; 26 Law J., Exch. 147.

juror is withdrawn by consent, each party pays his own costs(*k*); there is an end to the action, and, if the withdrawal was made by virtue of an agreement between the parties under circumstances showing that the particular cause of action was abandoned, no future action can be brought for the same cause. If, therefore, a second action is brought, the court will stay the proceedings therein(*l*).

1408 *Costs in actions of slander and libel.*—By 21 Jac. 1, c. 16, s. 6, it is enacted, that in all actions for slanderous words, if the jury upon the trial of the issue in such actions, or the jury that shall inquire of the damages, do find or assess the damages under 40*s.*, the plaintiff shall have and recover only so much costs as the damages so given or assessed amount unto. In the construction of this statute it has been held, that where the words are in themselves not actionable, but the action is maintainable by reason of special damage sustained by the plaintiff, the statute does not apply, and the plaintiff is consequently entitled (independently of the County Court Acts) to full costs, though the damages are under 40*s.*, for it is not the words but the special damage which is the cause of action; but that when the words are actionable in themselves, and the special damage is laid by way of aggravation, then if the damages are under 40*s.* there should be no more costs than damages, for the action is properly an action for words within the statute(*m*). Nor does the statute apply to cases where *no* damages at all are given. Where, therefore, to a declaration for slander the defendants pleaded not guilty and a justification, and at the trial no evidence was offered upon the second issue, and a verdict was given thereon for the plaintiff without any damages; but under the issue upon the plea of not guilty the defendants proved that the words spoken were a privileged communication, and upon that issue the verdict was for the defendants, it was held that the statute of James did not affect the case, and that the plaintiff was entitled to his full costs upon the second issue under the statute of Anne (*ante*, p. 1204)(*n*). Nor does the statute apply, it seems, to actions referred before trial, and where, therefore, there is no verdict. A plaintiff, therefore, would, in such a case, be entitled (independently of the County Court Act) to full costs in such a case, although he recovered but 20*s.*(*o*).

(*k*) Stodhart *v.* Johnson, 3 T. R. 657.
(*l*) Gibbs *v.* Ralph, 14 M. & W. 804; 15 Law J., Exch. 7. Harries *v.* Thomas, 2 M. & W. 38.
(*m*) Burry *v.* Perry, 2 Ld. Raym. 1588. Brown *v.* Gibbons, ib. 831; 1 Salk. 236.
(*n*) Skinner *v.* Shoppee, 8 Sc. 276; 6 B. N. C. 131.
(*o*) Frean *v.* Sargent, 2 H. & C. 293; 32 Law J., Exch. 281.

The 3 & 4 Vict. c. 24, s. 2 (*post*, p. 1209), enacts, that if the plaintiff in any action on the case recovers less than 40*s*. damages, he shall not be entitled to any costs, unless the judge or presiding officer certifies in manner therein provided that the grievance was wilful and malicious. This section, however, does not conflict with the 21 Jac. 1, c. 16, s. 6, so as to repeal it, but both enactments stand together. If the judge certifies under s. 2 of the statute of Victoria, the certificate will have the effect of taking the case out of the enacting part of that section, and will leave the plaintiff in the same position with respect to costs as he would have been in if the 3 & 4 Vict. c. 24 had never been passed. In cases where the statute of Gloucester (*ante*, p. 1204) applies, this would give the plaintiff his full costs, but where the right under the statute of Gloucester is qualified by any subsequent statute (by the County Court Acts, for instance), the certificate under 3 & 4 Vict. c. 24, leaves the plaintiff with that qualified right. A plaintiff, therefore, in an action for slander, who has obtained a certificate under 3 & 4 Vict. c. 24, s. 2, that the slander was wilful and malicious, and under 30 & 31 Vict. c. 142, s. 5, that there was sufficient reason for bringing the action in a superior court, is nevertheless only entitled to the same costs as he would have been entitled to if those statutes had not been passed, *i.e.*, independently of 21 Jac. 1, c. 16, to full costs, but under that statute to as much costs only as damages(*p*). Where, therefore, the words giving rise to an action of slander are not actionable in themselves, and the action is maintainable only by reason of special damage, the certificate of the judge or presiding officer under the statute of Victoria will entitle the plaintiff (independently of the County Court Acts) to full costs(*q*).

Where to an action for a libel in a newspaper the defendant pleaded the insertion of an apology and payment of 40*s*. into court (*ante*, p. 977), and the jury found that the apology was not sufficient, but that the money paid into court was sufficient to cover the damage sustained, and thereupon the judge directed a verdict for the plaintiff with 1*s*. damages, it was held that the plaintiff was deprived of costs, and that, the plea not being proved, the payment into court was not warranted by law, and the defendant ought to have his money back again(*r*). The damages in such cases must be assessed wholly irre-

(*p*) Evans *v.* Rees, 9 C. B., N. S. 391; 30 Law J., C. P. 16. Goodall *v.* Ensell, 2 Cr. M. & R. 249. Marshall *v.* Martin, L. R., 5 Q. B. 239.

(*q*) Burry *v.* Perry, *ut sup.* Turner *v.* Horton, Barnes, 133; Wilks, 436. Foster *v.* Pointer, 8 M. & W. 398; 1 Wms. Saund. note to Craft *v.* Bolte, 248a.

(*r*) Lafone *v.* Smith, 4 H. & N. 156. Newton *v.* Rowe, 1 C. B. 187.

spective of the plea, which is not proved; the jury may give less or more than the amount paid in, and according to what they give will the plaintiff be entitled to costs or the contrary(*s*).

1409 *When the certificate of a judge or presiding officer is necessary to enable the plaintiff to recover costs.*—By the 43 Eliz. c. 6, s. 2, it was enacted that in any personal action in the superior courts (not being for any title or interest in land, or for any battery), the plaintiff should not recover more costs than damages where the damages recovered did not amount to 40*s*. But the 3 & 4 Vict. c. 24, s. 1, repealed the above statute so far as it relates to costs in actions of trespass or on the case, and therefore practically altogether, so far as actions of tort are concerned(*t*). It also repealed so much of 22 & 23 Car. 2, c. 9, as relates to costs in personal actions, and enacts (s. 2), that if the plaintiff in any action of trespass or trespass on the case in any of the courts at Westminster, or the Court of Common Pleas at Lancaster or Durham, shall recover by the verdict of a jury less than 40*s*. damages, the plaintiff shall not be entitled to recover any costs whatever, whether it shall be given upon an issue tried, or judgment shall have passed by default, unless the judge or presiding officer before whom such verdict shall be obtained, shall immediately afterwards certify on the back of the record, or on the writ of trial, or writ of inquiry, that the action was really brought to try a right, besides the mere right to recover damages for the trespass or grievance for which the action has been brought, or that the trespass or grievance in respect of which the action is brought was wilful and malicious. See *post*, p. 1215.

Under this statute, the under-sheriff who presides at a writ of inquiry of damages after judgment by default may grant the certificate, but he should sign it in the name of the sheriff, and not in his own name(*u*).

1410 *Certificate that the action was brought to try a right.*—Wherever a defendant in an action for a tresspass upon the plaintiff's land sets up a *bonâ fide* claim to the enjoyment of some easement, privilege or profit thereon, such a right to take water from the plaintiff's well, or to dig turves on the plaintiff's common, and has any colorable ground for the claim, the action is brought to try a right, and the judge or presiding officer ought to certify to that effect upon the record(*x*). In actions

(*s*) Jones *v.* Mackie, L. R., 3 Exch. 1.

(*t*) See Danby *v.* Lamb, 11 C. B., N. S. 423; except, perhaps, under certain circumstances, in actions of detinue, which is in form an action *ex contractu*, though the gist of the action is the wrongful detainer. *S. C.*

(*u*) Stroud *v.* Watts, 2 C. B. 929.

(*x*) Tyler *v.* Bennett, 5 Ad. & E. 377. Macdougal *v.* Paterson, 11 C. B. 755.

for a nuisance, there is in general a question of right between the parties. The action may be brought to recover damages for the infringement of an acknowledged right, or to try whether the defendant has a right to do the act of which the plaintiff complains. In actions for a nuisance to a house, where the plaintiff asserts his right to occupy his house free from the nuisance caused by the defendant, and the latter declares that the acts complained of are not a nuisance, a right beyond the mere right to recover damages comes in question, and the judge has power to certify.

An action may be brought to try a right, though nothing appears on the record to indicate such an intention. Wherever the plaintiff seeks to negative the right of the defendant to do the act of which he complains, the action may be brought to try a right beyond the mere question of damages(*y*). "Suppose," observes Tindal, C.J., "a case can be put of a declaration in trespass or case (although I do not think it can) in which a right could not by possibility come in question, still, if it should appear to the judge that the plaintiff had really intended to try a right, I conceive that the judge would have power to certify. If an action be really brought to try a right, whether it is calculated for that purpose or not, the party is within the letter, and, as it seems to me, also within the spirit, of the Act "(*z*).

Wherever the record is so framed that a right beyond the mere right to recover damages *may* come in question, the court will not inquire whether or not the judge has exercised a sound discretion in granting a certificate. It is a matter entirely for the discretion of the judge, upon the effect of the evidence and the course taken at the trial(*a*).

1411 *Within what time the certificate must be granted.*—The words "immediately afterwards," in s. 2 of the 3 & 4 Vict. c. 24, do not mean that the cetificate is to be granted the very instant afterwards. "We interpret the words to mean," observes Lord Abinger, "within such reasonable time as will exclude the danger of intervening facts operating upon the mind of the judge, so as to disturb the impression made upon it by the evidence in the cause." Where, therefore, the certificate was given by the judge after the jury had been dismissed, and the court adjourned, and the judge had retired to his lodgings in the town, it was held that the certificate was well given(*b*). So, where the undersheriff, as presiding officer, on the execution of a writ of inquiry, on

(*y*) Shuttleworth *v.* Cocker, 1 M. & Gr. 839; 2 Sc. N. R. 47.
(*z*) Morison *v.* Salmon, 2 M. & Gr. 394.
(*a*) Bosanquet, J., Shuttleworth *v.* Cocker, 1 M. & Gr. 837.
(*b*) Thompson *v.* Gibson, 8 M. & W. 287.

being asked for a certificate, said he would take time to consider, and adjourned the court, and subsequently in the evening of the same day gave a certificate, it was held that the time taken by the under-sheriff to consider his judgment was perfectly reasonable. "I do not," observes Lord Abinger, "limit the reasonable time to the interval before the trial of another cause, or even necessarily to the same day "(*c*). But whenever the under-sheriff certifies, the certificate must be given before the return of the writ of inquiry(*d*). And a certificate not applied for till ten days after the trial cannot be granted(*e*). Where under a local statute, the London Small Debts Act(*f*), the certificate was to be granted "forthwith," and the judge took time to consider before he granted it, and the defendant did not object, it was held that he must be taken to have assented to the course pursued by the judge(*g*).

Where, on an application for a certificate under the above statute, the judge said that he would certify, if necessary, that the right came in question, and made a memorandum to that effect on his notes, it was held that a certificate subsequently indorsed on the record, had the same effect as if it had been indorsed at the trial(*h*).

1412 *County Court Acts depriving the plaintiff of costs in the superior courts.*— By the 30 & 31 Vict. c. 142, which was passed on the 20th August, 1867, but came into operation on the 1st January, 1868(*i*) (s. 33 and sched. C.), all the sections of previous county court acts as to costs are repealed(*j*), and by s. 5 it is enacted, that "if in any action commenced after the passing of this Act in any of Her Majesty's superior courts of record, the plaintiff shall recover a sum not exceeding 20*l.* if the action is founded on contract, or 10*l.* if founded on tort(*k*), whether by verdict, judgment by default, or on demurrer(*l*), or otherwise, he shall not be entitled to any costs of suit, unless the judge certify on the

(*c*) Page *v.* Pearce, 8 M. & W. 679.

(*d*) Knapman *v.* Pryer, 1 H. & N. 721.

(*e*) Forsdyke *v.* Stone, L. R., 3 C. P. 607.

(*f*) 15 & 16 Vict. c. lxxvii., s. 121, which has been repealed by 30 & 31 Vict. c. 142, s. 33, and sched. C.

(*g*) Heden *v.* Atlantic Mail, etc., Co., 29 Law J., Q. B. 191.

(*h*) Jones *v.* Williams, 13 M. & W. 423.

(*i*) See Wood *v.* Riley, L. R., 3 C. P. 26. Ings *v.* Lond. and South-West. Rail. Co., L. R., 4 C. P. 17.

(*j*) See Butcher *v.* Henderson, L. R., 3 Q. B. 335. Levi *v.* Sanderson, L. R., 4 Q. B. 330. Mount *v.* Taylor, L. R., 3 C. P. 645.

(*k*) As to detinue, see Danby *v.* Lamb, *ante*, p. 1209, *in notis*.

(*l*) The prohibition as regards costs was held under the repealed Acts to apply to issues of law as well as of fact, so that if in an action of tort there was an issue of fact and an issue of law, both of which were determined in favor of the plaintiff, but the damages recovered were less than the statutable amount, the plaintiff was wholly deprived of costs, unless he obtained an order or a certificate. Dunston *v.* Paterson, 5 C. B., N. S. 279. Abley *v.* Dale, 11 C. B. 398.

record(*m*) that there was sufficient reason for bringing such action in such superior court, or unless the court or a judge at chambers shall, by rule or order, allow such costs."

It has been held that this section applies to actions which have been commenced in an inferior court, but have been removed into a superior court by *certiorari*(*n*); *à fortiori* therefore to actions which have been commenced in a superior court, but have been sent for trial before a county court judge under 19 & 20 Vict. c. 108, s. 20(*o*). It also applies to actions referred by consent to an arbitrator who is to have the power of a judge at nisi prius as to certifying, etc.(*p*). It has been held also that it applies to all actions, both to those which can and to those which cannot be brought in the county court(*q*), but that if the plaintiff in an action of slander recovers any amount beyond 40*s*., inasmuch as he could not have sued in the county court(*r*), he ought, in the absence of circumstances showing that the action was vexatious, or of a trumpery character, or that the amount given was too large, etc.(*s*), to be allowed his costs, under the general power given by the concluding words of the section, although the judge had refused to certify(*t*). It is no ground for the exercise of the discretion of the court under the above section, that the plaintiff was misled by the registrar of the county court, or that the expense and delay of the proceedings in the county court would have exceeded those of the proceedings in the superior court(*u*), or that the parties reside a long way from one another(*v*).

1413 *When the foundation of the action is a contract*, and no right to sue exists independently of the contract, the action, though in form *ex delicto*, is in substance an action *ex contractu*, and the plaintiff must recover more than 20*l*., or obtain a certificate, rule, or order, in order to entitle himself to costs in the superior courts(*w*).

1414 *When money has been paid into court* not exceeding 20*l*. or 10*l*., as the case may be, and the plaintiff accepts it in satisfaction of the cause of action, he cannot get any costs, as he has not recovered more

(*m*) See Jones *v.* Williams, *supra*.
(*n*) Pellas *v.* Bresslauer, L. R., 6 Q. B. 438.
(*o*) Taylor *v.* Cass, L. R., 4 C. P. 614.
(*p*) Harland *v.* Mayor, etc., of Newcastle-on-Tyne, L. R., 5 Q. B. 47.
(*q*) Craven *v.* Smith, L. R., 4 Exch. 146; 38 Law J., Exch. 90.
(*r*) See *post*, p. 1214.
(*s*) Sampson *v.* Mackay, *infra*.
(*t*) Gray *v.* West, L. R., 4 Q. B. 175. Sampson *v.* Mackay, L. R., 4 Q. B. 643; 38 Law J., Q. B. 245. Hinde *v.* Sheppard, *post*, p. 1214.
(*u*) Holborow *v.* Jones, L. R., 4 C. P. 14.
(*v*) Thompson *v.* Dallas, L. R., 3 Q. B. 359.
(*w*) Legge *v.* Tucker, 1 H. & N. 500; 26 Law J., Exch. 71.

than the amount mentioned in the Act(x); but if he pays in more than 20*l.* or 10*l.*, the plaintiff will then be entitled to his costs. And if the amount recovered in the action, together with the amount paid into court, exceeds the amount mentioned, the plaintiff will be entitled to his costs. What the legislature meant by the word "'recover' was what the plaintiff is to get and put into his pocket"(y) by means of the action; and therefore, if the action is referred, although by consent, and the arbitrator awards a sum less or more than 20*l.* or 10*l.*, as the case may be, the plaintiff will be entitled to or deprived of his costs accordingly(z). If the cause is referred compulsorily, the same rule holds, both with regard to the costs of the cause and also the costs of the reference or award, which in such a case form part and parcel of the costs of the cause(a). Where, however, an action is referred by consent, and the costs of the reference are in the discretion of the arbitrator, the plaintiff will be entitled *to them* if the arbitrator so awards, although he recover less than the statutable amount, and so cannot have the costs of the cause(b). If the reference is of the cause and all matters in difference, and the submission states that the costs are to follow "the event of the reference," and the arbitrator finds, on a balance of accounts, less than the statutable amount due to the plaintiff, the plaintiff may, nevertheless obtain his costs if the arbitrator so decides, for he cannot be said to "recover" such amount within the meaning of the County Court Acts(c).

Where an action is brought against a common carrier for breach of the common-law duty to carry safely, the action is not founded on contract, but in an action *ex delicto* for negligence. It is an action on the case, and, therefore, if the plaintiff recovers more than 10*l.* he is entitled to his costs(d). Where the plaintiff in the first count of his declaration complained of an assault, and in the second count of slander, and recovered less than the statutable amount on the first count, but failed on the second, it was held that he was entitled to no costs without a certificate or judge's order(e).

1415 *The certificate that it appeared to the judge that there was sufficient reason for bringing the action in the superior court* is very much a matter of

(x) Boulding v. Tyler, 3 B. & S. 473; 32 Law J., Q. B. 85. Parr v. Lillicrap, ib. Exch. 151.
(y) Gowens v. Moore, 3 H. & N. 540.
(z) Cowell v. Amman Coll. Co., 34 Law J., Q. B. 161. See *post*, p. 1215.
(a) Moore v. Watson, L. R., 2 C. P. 314.
(b) Farshaw v. De Wette, L. R., 6 Exch. 209.
(c) Stevens v. Chapman, L. R., 6 Exch. 218.
(d) Tattan v. Gt. West. Rail. Co., 29 Law J., Q. B. 184.
(e) Smith v. Harnor, 3 C. B., N. S. 629.

discretion with the judge. There is no rule to guide him, but he must form his own opinion from the materials before him at the trial, and the court will not review his decision where the question is one of damages only(*f*). Where, however, an action is brought to try a right, and the right is of sufficient importance to make the action one proper to be brought in a superior court, the judge ought to certify, and if he does not his decision will be reviewed(*g*). The certificate, when granted, does not in anywise modify or control s. 2 of the 3 & 4 Vict. c. 24 (*ante*, p. 1209), for the discouragement of trifling and vexatious suits. Therefore, if such a certificate be obtained in a case where a less sum than 40*s.* is recovered in an action for a wrong, the plaintiff cannot get his costs without the further certificate that the action was brought to try a right, or that the grievance was wilful and malicious(*h*). A judge may, under this statute, it would seem, certify for costs at any time before taxation(*i*); but the under-sheriff, or presiding officer on a writ of trial, must probably certify before the writ is returned(*k*).

If it appears that the cause of action was one for which a plaint could not have been entered in the county court, although the judge or presiding officer should refuse to certify, the plaintiff will, generally speaking, obtain an order for his costs as above mentioned(*l*). Where, under the repealed Acts, an action was brought in a superior court for the detention of goods exceeding the value of 50*l.*, and the goods were returned to, and taken back by, the defendant after action, and the plaintiff went on with the action to recover further damages, and his costs, and obtained a verdict for a shilling damages, but the jury found that the value of the goods detained exceeded 50*l.*, it was held that the plaintiff was entitled to judgment for his costs, as no plaint would lie in the county court for goods of the value assessed(*m*). But where an action of trover was brought for the detention of a portmanteau of the value of 25*l.* for a claim of 1*s.* 6*d.*, and the portmanteau was delivered up to the plaintiff, and received back by him in court, and the jury then gave a verdict for 40*s.* damages, and the plaintiff failed

(*f*) Hatch *v.* Lewis, 7 H. & N. 867; 31 Law J., Exch. 26. Dimsdale *v.* Lond., Brighton and South Coast Rail. Co., 11 W. R., Q. B. 729.

(*g*) Hinde *v.* Sheppard, L. R., 7 Exch. 71.

(*h*) Powle *v.* Gandy, 7 C. B., N. S. 556.

(*i*) Martin, B., Mason *v.* Tucker, 4 H. & N. 538. Bennett *v.* Thompson, 6 Ell. & Bl. 663; 25 Law J., Q. B. 378.

(*k*) *Ante*, p. 1211. Craven *v.* Smith, *ante*, p. 1212.

(*l*) *Ante*, p. 1213. And see Macdougall *v.* Paterson, 11 C. B. 773, decided under the repealed sections.

(*m*) Leader *v.* Rhys, 10 C. B., N. S. 369; 30 Law J., C. P. 345.

to take a verdict for the value of the portmanteau, it was held that an order for costs could not be made, as a plaint could have been entered in the county court, and no sufficient reason was shown for bringing the action in the superior court(*n*).

1416 *Costs on references.*—Neither the 21 Jac. 1, c. 16 (*ante*, p. 1207), nor the 3 & 4 Vict. c. 24, apply to cases where, before trial, an action is referred by consent, or (*semble*) compulsorily, and where consequently no verdict is given(*o*). But where a verdict is taken, subject to a reference, they do, the verdict in such a case being the verdict of the jury, and the arbitrator merely determining the amount(*p*). But under the County County Court Acts there is no distinction in this respect between causes referred, either before or after verdict(*q*). When the cause has been referred, therefore, the plaintiff cannot obtain judgment for his costs, unless he recovers, through the instrumentality of the award and the verdict, a sufficient sum to carry costs under those acts(*r*). So in the case of a compulsory order of reference, in the common form, made under the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, by which the costs of the cause are to abide the event, if the plaintiff recovers less than the statutable amount mentioned in the act, he is not entitled to his costs without a rule or order for them(*s*).

1417 *Costs of reference.*—Whenever on a reference before issue joined the costs are to abide the event, and the plaintiff succeeds as to a very small part of the claim for which he brings his action, and fails as to the greater part of it, he is not entitled, as against the defendant, to the costs of the reference, for the event, in such a case, is substantially in favor of the defendant(*t*). It is otherwise on a reference after issue joined(*u*). But if the plaintiff recovers less than the amount mentioned in the County Courts Acts in a cause compulsorily referred under the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), he is not entitled to the costs of the reference(*x*).

1418 *Certificate for full costs in actions for wilful and malicious grievances.*—The 3 & 4 Vict. c. 24, s. 2, which deprives plaintiffs in the superior

(*n*) Dimsdale *v.* Lond. & Brighton Rail. Co., 11 W. R., Q. B. 729.
(*o*) Wigens *v.* Cook, 6 C. B., N. S. 784.
(*p*) Reid *v.* Ashby, 13 C. B. 897.
(*q*) Cowell *v.* Amman Coll. Co., *ante*, p. 1213.
(*r*) Smith *v.* Edge, 2 H. & C. 659; 33 Law J., Exch. 9. But see Stevens *v.* Chapman, *ante*, p. 1213.
(*s*) Robertson *v.* Sterne, 13 C. B., N. S. 248. See *ante*, p. 1213.
(*t*) Kelcey *v.* Stupples, 33 Law J., Exch. 6.
(*u*) Wigens *v.* Cook, *supra*.
(*x*) Moore *v.* Watson, L. R., 2 C. P. 314.

and palatine courts of their costs, if they recover by the verdict of a jury less than 40s., excepts cases in which the judge or presiding officer (*ante*, p. 1209) immediately afterwards certifies on the back of the record, etc., that the trespass or grievance in respect of which the action was brought was wilful and malicious. Whenever the judge certifies that the grievance for which the action was brought was wilful and malicious, the plaintiff is entitled to his costs under this statute. This has been held to be the case in an action for libel, where the plaintiff recovered a farthing damages, and the judge certified that the grievance was wilful and malicious(*y*). If a man inadvertently walk across another person's close, and the latter bring an action, the action would be frivolous, and the judge ought not to certify. But if the walking across the close be proved to have been done audaciously, and with a view of annoying the owner or his family, then the judge would be justified in granting the plaintiff a certificate that the trespass was wilful and malicious(*z*). A trespass which is committed after notice may fairly be deemed to be a wilful and malicious trespass. Originally the judges considered themselves absolutely bound to certify in all cases where the trespass was after notice, but it is now held that the judge has a discretion in the matter; but the discretion will generally be exercised in favor of the plaintiff when notice has been given. Where the defendant went to the plaintiff's house to make a seizure under process from the county court, and, being refused admittance, unlawfully broke open the outer door of the plaintiff's house with an axe, after a warning not to do so, and the jury gave only 40s. damages, the judge certified that the trespass was wilful and malicious, so as to give the plaintiff his full costs(*a*).

1419 *Full costs in actions for wilful and malicious trespass, or after notice not to trespass.*—By 8 & 9 Wm. 3, c. 11, s. 4, it is enacted, that in all actions of trespass in any of her Majesty's Courts of Record at Westminster, wherein at the trial of the cause it shall appear and be certified by the judge under his hand, upon the back of the record, that the trespass upon which any defendant shall be found guilty, was wilful and malicious, the plaintiff shall recover not only his damages but his full costs of suit. And the 3 & 4 Vict. c. 24, s. 2 (*supra*), excepts cases where the judge certifies that the trespass was wilful and malicious.

But the 3 & 4 Vict. c. 24 (*ante*, p. 1209), further enacts (s. 3), that

(*y*) Foster & Pointer, 9 C. & P. 721; 8 M. & W. 398.
(*z*) Shuttleworth v. Cocker, 1 M. & Gr. 836.
(*a*) Sherwin v. Swindall, 12 M. & W. 783.

nothing therein contained shall deprive any plaintiff of costs in any actions brought for a trespass over lands, commons, wastes, closes, woods, plantations, or inclosures, or for entering into any dwellings, outbuildings, or premises, in respect of which any notice not to trespass thereon or therein shall have been previously served by or on behalf of the owner or occupier of the land trespassed over or upon, or left at the last reputed or known place of abode of the defendant or defendants in such action. The plaintiff, therefore, is, under this section, entitled as of right to his full costs in an action for a trespass committed after notice, though he recover less than 40*s.* damages, and though the judge has refused to certify. The proper course for the plaintiff to adopt to entitle himself to costs is by entering a suggestion on the record, to the effect that the trespass was committed after notice, leaving the defendant to traverse the suggestion if so advised(*b*). If the defendant has a right of way over the plaintiff's land, a general notice not to trespass will not entitle the plaintiff to his costs under this section. The notice should be framed so as to warn the defendant not to deviate from the way. "The plaintiff," observes Patteson, J., "should say in effect, It is true you have a right of way over a particular part of the close, but you are to take care that you do not go out of that way. Here he has given a notice not to come upon the close at all"(*c*).

1420 *Costs in the superior courts in actions against justices.*—By 11 & 12 Vict. c. 44, s. 14, it is enacted, that if the plaintiff in an action against a justice of the peace for anything done by him in the execution of his office recovers a verdict, or the defendant allows judgment to pass against him by default, the plaintiff shall be entitled to costs as if the Act had not been passed; or if, in such case, it be stated in the declaration, or in the summons and particulars in a county court action, that the act complained of was done maliciously and without reasonable or probable cause, the plaintiff, if he recover a verdict for any damages, or if the defendant allow judgment to pass against him by default, shall be entitled to his full costs of suit, to be taxed as between attorney and client; and that in every action against a justice of the peace for anything done by him in the execution of his office, the defendant, if he obtain judgment upon verdict, or otherwise, shall in all cases be entitled to his full costs in that behalf, to be taxed as between attorney and client. The exception to the above rule contained in s. 13 has been mentioned, *ante*, p. 879.

(*b*) Bowyer *v.* Cook, 4 C. B. 236.

(*c*) Bourne *v.* Alcock, 4 Q. B. 635.

The 24 Geo. 2, c. 44, s. 6, enacts, as we have seen, that the constable or officer executing a justice's warrant shall, in a certain event, be sued only in conjunction with the justice or justices who issued the warrant, and that the jury on proof of the warrant shall find for the constable (*ante*, p. 865); and as regards the costs it is enacted, that if the verdict be given against the justice, the plaintiff shall recover his costs, to be taxed so as to include the costs the plaintiff is liable to pay to the defendant for whom such verdict shall be found.

1421 *In actions against constables and officers, and parties acting or intending to act in the execution of statutory powers*, such as those contained in the 1 & 2 Wm. 4, c. 41, the plaintiff, though he obtains a verdict, cannot (s. 19) recover any costs from the defendant unless the judge before whom trial takes place certifies his approbation of the action and of the verdict; and generally when an action is brought against a constable or a police-officer, or against private individuals, for anything done in pursuance of an Act of Parliament, or with the *bonâ fide* intention of executing the provisions of some particular statute, and a verdict passes for the defendant, or the plaintiff becomes nonsuit or discontinues the action after issue joined, or if, upon demurrer or otherwise, judgment is given against the plaintiff, the defendant is entitled to recover his full costs as between attorney and client, and has the like remedy for the same as any defendant has in ordinary cases(*d*).

1422 *Certificate for costs in actions for things done in supposed pursuance of the Act for the protection of property from malicious injuries.*—By the 71st section of the 24 & 25 Vict. s. 97, it is enacted, that though a verdict shall be given for the plaintiff in an action against any person for anything done in pursuance of the Act, such plaintiff shall not have costs against the defendant unless the judge before whom the trial shall be, shall certify his approbation of the action. If, therefore, the judge does not at the trial give a certificate of approbation in conformity with the statute, the defendant is entitled to a suggestion of the fact on the record, in order to deprive the plaintiff of costs which he would otherwise recover(*e*).

1423 *Costs in actions against executors.*—By 3 & 4 Wm. 4, c. 42, s. 31, it is enacted, that in every action brought by any executor or administrator in right of the testator or intestate, such executor or administrator

(*d*) See 5 & 6 Wm. 4, c. 76, s. 133.

(*e*) Norwood *v.* Pitt, 5 H. & N. 801; 28 Law J., Exch. 212; decided under the 41st section of the repealed Act, 7 & 8 Geo. 4, c. 30.

shall, unless the court in which such action is brought, or a judge of any of the superior courts, shall otherwise order, be liable to pay costs to the defendant in case of being nonsuited, or a verdict passing against him, and in all other cases in which he would be liable if he were suing in his own right upon a cause of action accruing to himself; and the defendant shall have judgment for such costs, and they shall be recovered in like manner(*f*)

1424 *Costs in actions for duties and penalties at the suit of the Crown*—By 16 & 17 Vict. c. 107, s. 263, it is enacted, that in all suits or proceedings at the suit of the Crown for the recovery of any duty or penalty, or the enforcement of any forfeiture under that Act, or any Act relating to the customs, the parties thereto shall be entitled to recover costs against each other, in the same manner as if such suits or proceedings were conducted and had between subject and subject.

1425 *In actions upon judgments*, the plaintiff is not entitled to any costs of suit unless the court in which the action is brought, or some judge of the same court, makes an order for costs, 43 Geo. 3, c. 46, s. 4. And the 31 & 32 Vict. c. 54, which enables Scotch and Irish judgments to be registered in England, and *vice versâ*, contains a similar provision (s. 6). But these statutes apply only where the action is brought on the judgment alone. Where, therefore, a declaration containing two counts, one on a judgment, and another on a separate and distinct cause of action, and the plaintiff succeeded on both counts, it was held that he was entitled to his full costs without any order(*g*).

1426 *Costs on new trials.*—If a new trial be granted without any mention of costs in the rule, the costs of the first trial will not be allowed to the successful party, though he succeed on the second(*h*). In the case of a new trial granted by reason of the misdirection of the judge, in an action in the superior courts, the party who succeeds in obtaining the rule absolute gets no costs. And where the judgment of the court below is reversed in a court of error, inasmuch as the judgment is not given for the defendant, but merely that the plaintiff *nil capiat per breve*, the statutes which give costs to the successful party in actions brought in the superior courts do not apply(*i*).

1427 *In cases of appeals from the decision of a county court judge, or judge of an inferior tribunal*(*k*), it is entirely in the discretion of the court to

(*f*) See Gray on Costs, 227-235.
(*g*) Jackson v. Everett, 1 B. & S. 857; 31 Law J., Q. B. 59.
(*h*) Reg. Gen. Hil. Term, 1853, R. 54; 1 Ell. & Bl. App. xii.
(*i*) Schroder v. Ward, 13 C. B., N. S. 410; 32 Law J., C. P. 150.
(*k*) As to costs on appeals against the decisions of magistrates, see Wednesbury Board of Health v. Stephenson, 33 Law J., M. C. 111.

make such order with respect to costs as it thinks fit. "The rule," observes Willes, J., "which will in future be adopted in this court, is, that the successful party, whether appellant or respondent, will be entitled to his costs, unless there are some special circumstances which take the case out of the general rule; for we do not think that there is, for the purpose of costs, any analogy between the case of a new trial obtained by reason of the misdirection of a judge in an action brought in one of the superior courts, and an appeal from a county court on the ground of misdirection"(*l*). But the costs must be asked for at the time the case is disposed of(*m*). If the judgment below be reversed, that part of it that deals with costs will be reversed also(*n*).

In the case of an appeal to the Privy Council from the decision of the judge of the Court of Admiralty, the Privy Council, having reversed the decision, gave the appellant not only his costs of appeal, but also the costs in the court below, saying that the unsuccessful party must take the consequences of bringing an action which he could not sustain(*o*).

1428 *In the case of an appeal from a superior court to the Court of Exchequer Chamber*, the general rule is that costs follow the affirmance of the judgment below; but when the court is equally divided there can be no judgment for costs(*p*).

1429 *Costs on removal of actions by writ of certiorari.*—When an action *ex contractu* is removed by certiorari (*ante*, p. 777), the plaintiff is not bound to follow the action into the superior courts. If, therefore, the plaintiff fails to proceed, the defendant has no means of getting judgment for his costs(*q*). If, however, the plaintiff proceeds with the action so removed and obtains a verdict, he will be entitled to his full costs, to be taxed on the higher scale, though he recovers less than 20*l*.(*r*).

1430 *In cases of prohibition*, a plaintiff for whom a verdict is given by the jury is not entitled to recover the costs of the proceedings in the court below as damages under the 1 Wm. 4, c. 21, s. 1(*s*).

1431 *On indictments for libel and slander*, preferred by a private prosecutor,

(*l*) Schroder *v.* Ward, *ut sup.*, dissenting from Gee *v.* Lanc. & York. Rail. Co., 6 H. & N. 221; 30 Law J., Exch. 11. Conybeare *v.* Farries, L. R., 5 Exch. 16.

(*m*) Taylor *v.* Gt. North. Rail. Co., L. R., 1 C. P. 430. Budenberg *v.* Roberts, L. R., 2 C. P. 292.

(*n*) Gage *v.* Collins, L. R., 2 C. P. 381.

(*o*) Valentine *v.* Cleugh, 8 Moo. P. C. C. 167; and see 7 ib. Appendix.

(*p*) Archer *v.* James, 2 B. & S. 61.

(*q*) Garton *v.* Gt. West. Rail. Co., 28 Law J., Q. B. 103.

(*r*) Perry *v.* Bennett, 14 C. B., N. S. 402.

(*s*) White *v.* Steel, 12 C. B., N. S. 383; 33 Law J., C. P. 1.

if judgment is given for the defendant, the defendant is entitled to his costs; but if there be a special plea of justification, and the issue thereon be found for the prosecutor, the latter will be entitled to recover from the defendant the costs he has sustained by reason of such plea, 6 & 7 Vict. c. 96, s. 8.

1432 *Costs of writs of mandamus and injunction.*—By the Common Law Procedure Act, 1860, 23 & 24 Vict. c. 126 (s. 32), it is enacted, that when a writ of mandamus or of injunction is issued under the provisions of the Common Law Procedure Act, 1854 (*post*, ch. 23), such writ shall, unless otherwise ordered by the court or a judge, in addition to the matter directed to be inserted therein, command the defendant to pay to the plaintiff the costs of preparing, issuing, and serving such writ; and payment of such costs may be enforced in the same manner as costs payable under a rule of court.

1433 *On an application for an injunction under the Railway and Canal Traffic Act*, costs will be awarded to the successful applicant, for the court will not without strong reason depart from the rule, that when a company has so acted as to make it proper for any person to come to the court for relief under the statute, that relief ought to be obtained at the costs of those whose acts have occasioned the application(*t*).

1434 *Repeal of divers statutes enabling plaintiffs in certain actions to recover double costs.*—By the 5 & 6 Vict. c. 97, s. 1, it is enacted, that so much of any clause or enactment in any local or personal Act, or in any Act of a local or personal nature, whereby it is enacted that either double or treble costs, or any other than the usual costs between party and party, may be recovered, shall be repealed, and in lieu thereof the usual costs between party and party may be recovered, and no more. And (s. 2) that so much of any enactment in any public Act, not local or personal, whereby it is enacted that either double or treble costs, or any other than the usual costs between party and party may be recovered, shall be repealed, and instead of such costs the party shall receive such full and reasonable indemnity as to all costs, charges and expenses incurred in and about any action or other legal proceeding as shall be taxed by the proper officer in that behalf.

No double costs in error are to be allowed to either party(*u*).

1435 *Costs in compensation cases*(*x*).—An offer of compensation by a railway

(*t*) Baxendale *v.* Lond. and South-West. Rail. Co., 19 C. B., N. S. 758.

(*u*) 5 & 6 Vict. c. 97, s. 2; 17 & 18 Vict. c. 125, s. 44. New Pleading Rules, Hil. Term, 1853, R. 69; 1 Ell. & Bl. App. xiv. Cooper *v.* Slade, 1 Ell. & Ell. 336. Gray on Costs, 181-186.

(*x*) By 32 & 33 Vict. c. 18, "The Lands Clauses Act, 1869," such costs may be taxed by a master; but the Act only refers to arbitrations pure and simple under the Lands Clauses Act,

company to a person whose land has been injuriously affected by the construction of a railway (*ante*, p. 899), must be made at least ten days before the holding of the inquisition of damages (*ante*, p. 903), in order to throw upon the party seeking compensation, and not obtaining more than the sum offered, the burthen of paying his own costs(*y*). There is nothing, however, to prevent the company from subsequently making a larger offer, provided they make it in time, and if the aggregate of the sums recovered by the claimant does not exceed the aggregate of the sums so offered by the company, he will not be entitled to his costs(*z*). The offer must be unconditional. An offer of one sum for compensation and costs is, therefore, bad(*a*). In the case of a landowner, whose land has been severed, demanding a communication to be made, and the company preferring to take to the land as being of less value than the expense of making the communication, the Act makes no provision as to costs(*b*). A person whose lands are injuriously affected, and who recovers by the verdict of a jury under s. 68 of the 8 & 9 Vict. c. 18, more than the company offered is entitled to the costs of the inquiry(*c*).

1486 *Taxation of costs.*—By the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76 (s. 223), the judges, or eight or more of them, with their chiefs, are empowered to make general rules and orders for fixing costs, apportioning costs of issues, and for enforcing uniformity of practice in the allowance of costs. "Costs are an indemnity; they are given to the person who receives them to indemnify him in respect of the costs of some proceeding which the other person has compelled him to take. They are not a punishment on the party who is to pay them, nor a bonus to the party who is to receive them. The principle, therefore, is to find out the extent of the damnification, and then you can find out the amount of costs you are to allow(*d*). They ought to be a fair indemnity to the party, and if they are not so, the rules which govern the taxation of costs ought to be altered(*e*).

A plaintiff who has been kept attending as a material witness in

and not to cases, where other matters are involved. Doulton *v.* Met. Board of Works, L. R., 5 Q. B. 333.

(*y*) Metrop. Rail. Co. *v.* Turnham, 14 C. B., N. S. 212. See Owen *v.* Lond. and North-West. Rail. Co., L. R., 3 Q. B. 54.

(*z*) Hayward *v.* Metrop. Rail. Co., 33 Law J., Q. B. 73. See Caledonian Rwy. *v.* Carmichael, L. R., 2 Sc. App. 56.

(*a*) Balls *v.* Metrop. Board of Works, L. R., 1 Q. B. 337.

(*b*) Cobb *v.* Mid. Wales Rail. Co., L. R., 1 Q. B. 342.

(*c*) South-East. Rail. Co. *v.* Richardson, 21 Law J., C. P. 122.

(*d*) Bramwell, B., Harold *v.* Smith, 5 H. & N. 381; 29 Law J., Exch. 141.

(*e*) Pollock, C.B., Doe *v.* Filliter, 13 M. & W. 51.

his own cause may be allowed the expenses of his attendance, for the reasonable expenses to which a plaintiff is put by being obliged to attend and be examined as a witness to seek redress for an injury should be thrown upon the wrong-doer(*f*). And if the plaintiff has been obliged to quit his vessel and abandon an intended voyage, and remain in England to give evidence, the reasonable and necessary expenses of his maintenance may be allowed him(*g*). And where the defendant's presence in court is reasonably necessary for his defence, the expense of his attendance will be allowed if the defence is successful(*h*).

When there are several defendants who defend jointly, and one of them gets a verdict, he will be entitled to an aliquot portion of the joint costs of the defence, and to any additional costs that were reasonably necessary for his defence(*i*). If several defendants defend separately by separate attorneys, and a verdict is given in favor of some or all of them, each successful defendant is entitled to the costs of his defence(*k*).

Where the jury, being unable to agree upon their verdict, are discharged by the judge, and the plaintiff afterwards discontinues, the defendant is not entitled to the costs of the trial(*l*).

The court is bound not to allow a successful party all the expense he may have thought proper to incur when it can see that part of it has been needless. Where there is matter ascertained in the cause, whether appearing upon the face of the proceedings or established by the statement of the judge, founded upon his judicial knowledge of the facts, whereby the master is satisfied that witnesses called by the successful party have been wholly useless, he ought to disallow the expenses of such evidence(*m*).

1437 *Costs of particular issues.*—The costs of any issue, either of fact or of law, follow the finding or judgment upon such issue, and will be adjudged to the successful party, whatever may be the result of the other issues(*n*). But when issues in law and fact are raised, the costs of the several issues, both in law and fact, will follow the finding or judgment; and if the party entitled to the general costs of the cause

(*f*) Howes v. Barber, 18 Q. B. 588; 21 Law J., Q. B. 254.
(*g*) Ansett v. Marshall, 22 Law J., Q. B. 118.
(*h*) Flower v. Gardner, 3 C. B., N. S. 167; 27 Law J., C. P. 56.
(*i*) Griffiths v. Kaynaston, 2 Tyr. 757. Bartholomew v. Stephens, 5 M. & W. 366. Gray on Costs, 96.
(*k*) Newton v. Boodle, 4 C. B. 359. Gambrell v. Falmouth, 5 Ad. & E. 403.
(*l*) Wall v. Lond. & South-West. Rail. Co. 11 Exch. 696.
(*m*) Reynolds v. Harries, 3 C. B., N. S. 291; 26 Law J., C. P. 26.
(*n*) 15 & 16 Vict. c. 76, s. 81.

obtain a verdict on any material issue, he will also be entitled to the general costs of the trial(*o*); but if no material issue in fact be found for the party otherwise entitled to the general costs of the cause, the costs of the trial will be allowed to the opposite party(*p*). If judgment goes by default, the plaintiff is entitled to nominal damages on each count. He is, therefore, entitled to the expenses of witnesses called to prove damage on every count, although the jury on the inquisition disbelieve such witnesses, and find there was no damage as to one count(*q*).

The party who is entitled to the costs of the cause is entitled to the costs of evidence applicable to any issue or issues found for him, though also applicable to an issue or issues found against him, and the other party is entitled only to the costs of evidence exclusively applicable to an issue or issues upon which he has succeeded. Costs apart from costs in the cause are only given by the rule of court and statute to a party succeeding upon an issue(*r*). It is for the master to ascertain whether any and what costs have been incurred as to part of the issue found for the defendant, and when they can be ascertained to have been incurred relative to that only, to tax them to the defendant, though the plaintiff has succeeded, and is entitled to the general costs of the cause(*s*).

Where a plea consists of several parts, the party succeeding on any one of those parts is entitled to have that part treated as if it were a separate plea raising a several issue(*t*).

1438 *Where costs are to be taxed by the court in which the action is brought*, under the provisions of certain acts of parliament, giving a defendant costs in certain cases where he would not otherwise be entitled to them, and the cause is removed by writ of certiorari from an inferior to a superior court, the superior court cannot give judgment for costs, as it is not the court in which the action was brought(*u*).

1439 *Security for costs.*—When the plaintiff in the action is a foreigner, having no permanent place of abode in this country, the court will stay proceedings in the action until he has given security for costs to

(*o*) See Dignam *v.* Bailey, L. R., 5 Q. B. 53.

(*p*) Reg. Gen. Hil. Term, 16 Vict., R. 63; 1 Ell. & Bl. App. xiii. As to this, see Chitty's Arch. Pr., 11th ed. 498.

(*q*) Dods *v.* Evans, 33 Law J., C. P. 146.

(*r*) Reynolds *v.* Harris, 3 C. B., N. S. 289.

(*s*) Traherne *v.* Gardner, 8 Ell. & Bl. 182. As to costs of abortive issues, 15 & 16 Vict. c. 76, s. 145, and the New Pr. Rules, Hil. Term, 1853, R. 63; 1 Ell & Bl. App. xiii.

(*t*) Davis *v.* Thomas, 5 Jur. N. S. 709.

(*u*) Connell *v.* Watson, 2 Dowl. P. C. 139. Woodhall *v.* Voight, 6 H. & N. 153; 30 Law J., Exch. 31. Costello *v.* Corlett, 4 Bing. 474.

the satisfaction of the master(*x*). Where, also, a sham plaintiff, a pauper, is set up to sue for penalties for the benefit of others who keep in the background, the court may require him to give security for costs(*y*). If, also, the plaintiff is residing abroad out of the jurisdiction of the court, he may be required to give security for costs(*z*). But an officer engaged in the service of the Crown in a foreign country cannot be required to give such security(*a*); nor is it necessary for a plaintiff suing in England, but residing in Ireland or Scotland, or *vice versâ*, to find security, "unless the court, on special grounds, shall otherwise order" (31 & 32 Vict. c. 54, s. 5); nor for the trustee of a bankrupt, or the executor of a deceased person, suing for the benefit of the estate, although such trustee or executor be in insolvent circumstances(*b*). The proviso in the 30 & 31 Vict. c. 142, s. 10, has been mentioned, *ante*, p. 1138.

Where a limited liability company is plaintiff, it may be required to give security for costs, if it be shown that there is reason to believe that the assets of the company will not suffice to pay the defendant his costs, in case he is successful, and proceedings may be stayed until such security is given(*c*).

1440 *Award of costs in the county court.*—By 9 and 10 Vict. c. 95, s. 88, it is enacted that all the costs of any action or proceeding in the county court, not therein otherwise provided for, shall be paid by or apportioned between the parties, in such manner as the judge shall think fit, and in default of any special direction shall abide the event of the action. And by the 30 & 31 Vict. c. 142, s. 14, it is enacted, that whenever an action or suit is brought in the county court, which the court has no jurisdiction to try, the court shall order the cause to be struck out, and shall, unless the parties consent to the trial of the cause in the county court, have power to award costs in the same manner as if the court had jurisdiction, and the plaintiff had not appeared, or had appeared and failed to prove his demand. If the cause has been sent by a superior court to a county court for trial under 30 & 31

(*x*) Nylander *v.* Barnes, 30 Law J., Exch. 150. Zychlinski *v.* Maltby, 14 C. B., N. S. 322. Chapple *v.* Watt, 29 Law J., Q. B. 167.

(*y*) Browne *v.* Redmond, 11 Ir. C. L. R., App. xxviii. Rice v. Dub. & Wick. Rail. Co., 8 Ib. 155 C. P.

(*z*) Holmes *v.* Pemberton, 28 Law J., Q. B. 173.

(*a*) Whittall *v.* Campbell, 5 H. & N. 601.

(*b*) Denston *v.* Ashton, L. R., 4 Q. B. 590. Sykes *v.* Sykes, L. R., 4 C. P. 645; 38 L. J., C. P. 281.

(*c*) 20 & 21 Vict. c. 14, s. 24. See Caillaud's Patent Tanning Co. *v.* Caillaud, 28 Law J., Ch. 867.

Vict. c. 142, s. 10, the costs are entirely in the jurisdiction of the county court(*d*).

Costs of prosecutions.—When any person has been convicted on an indictment for a common assault, or an assault with wounding, etc., the court may, in addition to the sentence pronounced upon the offender, order him to pay to the prosecutor his actual and necessary costs and expenses of the prosecution, and such moderate allowance for loss of time as the court may, by affidavit, or other inquiry and examination, ascertain to be reasonable; and if the sum awarded is not paid, the offender may be imprisoned, or the amount levied by distress and sale of his goods and chattels(*e*).

As to costs of injunction under Common Law Procedure Act, see *post*, p. 1235.

(*d*) Moody v. Steward, L. R., 6 Exch. 35.

(*e*) 24 & 25 Vict. c. 100, ss. 74, 75.

CHAPTER XXIII.

OF DAMAGES IN CHANCERY, AND THE REMEDY BY INJUNCTION, PROHIBITION, AND CERTIORARI.

SECTION I.—*Damages in courts of equity*—Award of damages in Chancery—The writ of injunction to prevent or restrain the commission or continuance of wrongful acts—Injunction to restrain a public company from exceeding its statutory powers, to prevent disturbance of grave-yards and obstructions to rights of burial, to restrain the infringement of patent rights and copyright, and the sale or detention of chattels—Effect of delay in applying for the writ—Acquiescence precluding the plaintiff from relief—Trial of questions of law and fact in the Courts of Chancery—Remedy by injunction at common law—Injunction at common law to restrain infringements of patent right and copyright—Injunctions and orders to stay proceedings.

SECTION II.—*Of the remedy by prohibition for the prevention of judicial wrongs.*—The writ of prohibition—Prohibition before and after judgment and execution—Prohibition where appeal lies—Principle on which the writ goes to the spiritual courts—Prohibition notwithstanding an appeal—Writ of prohibition to restrain a county-court judge—Prohibition to the Lord Mayor's court—Proceedings in prohibition—Rule to show cause—Notice of the issue of the writ—Refusal of writ when final—Of setting aside prohibitions issuing out of Chancery.

SECTION III.—*Of the remedy by certiorari.*—The writ of certiorari—Where the inferior court has jurisdiction—Where the inferior court has no jurisdiction—Grounds for the issue of the writ—Upon an inquisition of damages before the sheriff—Certiorari to remove causes from the county court—Of the concurrent remedy by appeal and by certiorari—Application for the writ—Affidavits when necessary—Notice and effect of the issue of the writ—Refusal of the writ—Proceedings after removal—Quashing of the writ—Procedendo.

SECTION I.

OF DAMAGES IN CHANCERY AND THE REMEDY BY INJUNCTION.

1441 *Award of damages in the Court of Chancery.*—By the Chancery Amendment Act, 1858, 21 & 22 Vict. c. 27, commonly called Lord Cairn's Act, it is enacted (s. 3), that in all cases in which the Court of

Chancery has jurisdiction to entertain an application for an injunction against the commission or continuance of any wrongful act, it shall be lawful for the court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction, and such damages may be assessed in such manner as the court shall direct(*a*). The meaning of the statute is, that where the court has jurisdiction in the suit, it may award damages in substitution for specific performance(*b*). Damages independent of relief in the Court of Chancery will not be given, for the statute, it has been observed, was never intended to transfer the jurisdiction in a simple case of damages from a court of common law to a court of equity(*c*), and throw upon a court of equity the functions which properly belong to a jury(*d*). But this will not prevent a plaintiff, who at the time of filing his bill is entitled to an injunction to restrain the infringement of his patent, from pursuing his remedy for damages in Chancery, although the patent expires between the time of the filing of the bill and the hearing(*e*); nor is the plaintiff prevented by the Act from pursuing his remedy for damages at common law, though he may also be suing for relief in equity(*f*). He is not entitled however, to damages in a court of equity if he filed his bill only four days before the expiration of the patent(*g*). If the plaintiff, a patentee, and also a manufacturer, has been in the habit of licensing others to use his patent, at a fixed royalty, the loss of that royalty is the measure of damages against a person who has infringed the patent, and the plaintiff cannot claim in addition manufacturer's profit, on the supposition that the articles made by the defendant, and in which the infringement took place, might have been sent to him to be fitted with the patent(*h*).

1442 *The writ of injunction issuing out of Chancery* is, as we have seen (*ante*, p. 91), a prohibitory writ granted at the discretion of the court, restraining a defendant from the repetition or continuance of a wrongful act; and enforceable, in case of disobedience, by attachment(*i*).

(*a*) Mold *v.* Wheatcroft, 30 Law J., Ch. 598. Schotsman *v.* Lancashire and Yorkshire Rail. Co., L. R., 1 Eq. Ca. 349.

(*b*) Soames *v.* Edge, Johns. 669.

(*c*) Howe *v.* Hunt, 33 Law J., Ch. 36. Chinnock *v.* Sainsbury, 30 Ib. 409. Betts *v.* Gallais, *infra*.

(*d*) Rogers *v.* Challis, 27 Beav. 175; 29 Law J., Ch. 240. Betts *v.* De Vitre, 34 Law J., Ch. 289. Durell *v.* Pritchard, L. R., 1 Ch. App. 244. Ferguson *v.* Wilson, L. R., 2 Ch. App. 77. Scott *v.* Rayment, L. R., 7 Eq. Ca. 112.

(*e*) Davenport *v.* Rylands, L. R., 1 Eq. Ca. 302.

(*f*) Anglo-Danubian Co. *v.* Rogerson, L. R., 4 Eq. Ca. 3.

(*g*) Betts *v.* Gallais, L. R., 10 Eq. Ca. 392.

(*h*) Penn *v.* Jack, L. R., 5 Eq. Ca. 81.

(*i*) Drewry on Injunctions, Kerr on Injunctions, Goldsmith's Eq. Pr., 8th ed.

The object of the equitable interference by injunction is to prevent the infringement or disturbance of a clear legal right(*j*), or for the purpose of better enforcing legal rights, or preventing mischief until such rights have been ascertained(*k*). Various instances of the granting of this writ for the protection and preservation of legal rights have been already given in the case of injunctions to prevent the disturbance of rights incident to the possession and ownership of land (*ante*, pp. 91, 93), easements and profits *à prendre* (*ante*, pp. 186, 187), for the prevention of brick-burning(*l*) and nuisances (*ante*, p. 251, *et seq.*), for the prevention of waste (*ante*, pp. 316–319), for the prevention of trespasses (*ante*, pp. 387, 389), to enforce compliance by railway and canal companies with the provisions of the Railway and Canal Traffic Act (*ante*, pp. 629–632), to restrain public companies from doing acts *ultra vires* (*ante*, p. 919 *et seq.*), and to prevent and repress fraud and the fraudulent use of trade-marks (*ante*, p. 1015 *et seq.*)(*m*).

The interference of the court is not, as we have seen, confined to the prevention of the continuance of an injury already done, but its assistance may be invoked for the purpose of averting a threatened mischief(*n*). The court will not interfere for the protection of public rights, unless it is satisfied that the interests of the public require the issue of the injunction(*o*).

1443 *Injunction to restrain a public company from exceeding its statutory powers*, will be granted at the suit of a private person who has sustained some private individual injury thereby, but not, as we have seen, at the instance of a rival company, or any public body not qualified to represent the interests of the public(*p*). Thus it will issue to restrain a public company, which by its deed of settlement was empowered to refuse to authorize a transfer to any person not approved by them, from refusing to transfer at all, though whether it would issue to compel them to authorize a transfer of shares to a nominee of a rival company was considered doubtful(*q*). So to restrain a rail-

(*j*) Herr v. Union Bank, 2 Giff. 686.

(*k*) Saunders v. Smith, 3 Myl. & Cr. 729. Lanahan v. Gahan, 37 Md. 105.

(*l*) Beardmore v. Tredwell, 3 Giff. 683.

(*m*) As to infringements of right of access to a public river, Att.-Gen. v. Thames Conservators, 1 H. & M. 1.

(*n*) *Ante*, pp. 91, 397. Tinkler v. Wandsworth District Board, 2 De G. & J. 272. Gibson v. Smith, 2 Atk. 182. Catlin v. Valentine, 9 Paige, 575. Peck v. Elder, 3 Sandf. (N. Y.) 126.

(*o*) Felkin v. Ld. Herbert, 30 Law J., Ch. 604. Ryde Com. v. Isle of Wight Ferry Co., 30 Beav. 616. Wandsworth Board, etc., v. Lond. & South-West. Rail. Co., 31 Law J., Ch. 854. Wintle v. Brist. & South-West. Rail. Co., 6 L. T. R., N. S. 20.

(*p*) *Ante*, p. 316. Stockport District Water Co. v. Manchester (Mayor, etc.), 11 W. R. 156. Bostock v. North Staff., etc., *ante*, p. 921. Tinkler v. Wandsworth, etc., *ante*, p. 921. See Bradley v. Ballard, 55 Ill. 413; Gifford v. New Jersey R. R. Co., 2 Stockt. (N. J.) 171.

(*q*) Robinson v. Chartered Bank, L. R., 1 Eq. Ca. 32.

way company from paying dividends out of capital(*r*), or from prosecuting a suit not instituted by it(*s*).

1444 *Injunction to restrain disturbance of grave-yards, and obstructions to rights of burial.*—If a person takes a mortgage of the ground of a cemetery belonging to a company, and the company continues after the mortgage to grant permanent rights of burial, and persons are buried in the mortgaged land with the knowledge of the mortgagee, the Court of Chancery will, by injunction, restrain the latter from disturbing the ground and interfering with the graves and the right of burial. The Act to amend the laws concerning the burial of the dead in the metropolis (15 & 16 Vict. c. 85), putting an end to the general right of burial therein, specially reserves permission for particular individuals having private rights to bury in the grounds which are within the provisions of the Act, provided they previously obtain the sanction of one of Her Majesty's principal secretaries of state for the time being, for the purpose. The legislature, therefore, has in a qualified manner preserved these rights, and the interference of the court may be obtained for their protection against the acts of wrong-doers who seek to interfere with the graves or the soil of the burying-ground(*t*).

1445 *Injunction to restrain the infringement of patent rights and copyright.*—If a plaintiff is in a position to support by proper evidence his title to a patent, and to prove the fact of its having been infringed, he is entitled to an injunction to stop the mischief(*u*), both against the manufacturer and the person who uses the patent(*v*), and to an account of the profits they may have made by their invasion of the plaintiff's privilege, or to an inquiry as to damages, at his option(*w*). But it is not the practice of the courts of equity to grant a perpetual injunction to restrain the infringement of a patent, unless the legal validity of the patent has been conclusively established(*x*), which must now,

(*r*) Bloxam *v.* Metrop. Rail. Co., L. R. 3 Ch. App. 337. Salisbury *v.* Metrop. Rail. Co., 38 Law J., Ch. 249. See Hoole *v.* Gt. West. Rail. Co., L. R., 3 Ch. App. 262

(*s*) Kernaghan *v.* Williams, L. R., 6 Eq. Ca. 228. See Abrahams *v.* Lord Mayor, etc., of London, L. R., 6 Eq. Ca. 625. See Pickering *v.* Stephenson, L. R., 14 Eq. Ca. 322.

(*t*) Moreland *v.* Richardson, 26 Law J., Ch. 690; 25 ib. 883. The invasion of grounds appropriated to burial purposes may be restrained by injunction. Trustees, etc. *v.* Walsh, 57 Ill. 363.

(*u*) Gardner *v.* Broadbent, 2 Jur. N. S. 1041. Bacon *v.* Jones, 4 Myl. & Cr. 433. Davenport *v.* Rylands, *ante*, p. 1228. Bovill *v* Goodier, L. R., 2 Eq. Ca. 195.

(*v*) Penn *v.* Bibby, L. R., 3 Eq. Ca. 308.

(*w*) Neilson *v.* Betts, L. R., 5 Eng. & Ir. App. 1. See Saxby *v.* Esterbrook, L. R., 7 Exch. 207. As to interrogatories, see Hoffman *v.* Postill, L. R., 4 Ch. App. 673.

(*x*) Hills *v.* Evans, 31 Law J., Ch. 457. As to the legal validity of patent rights, see Lang *v.* Gisborne, ib. 771; Miller *v.* McElroy, 1 Pa. Law Jour. R. 336; Sykes *v.* Manhattan, etc., Drying Co., 6 Blatchf. 496

under the 25 & 26 Vict. c. 42, the Chancery Regulation Act, 1862, be done before the Court of Chancery itself(*y*). If, after the decree has been pronounced, the patent becomes void, by the decision of a court of competent jurisdiction or otherwise, the injunction becomes of no effect(*z*). Where the patentee manufactures and sells the patent both in this country and abroad, the onus lies upon him to show not only that the article of which the sale is complained of was not made by him in this country, but also that it was not made by him or his agents abroad(*a*).

We have seen that an injunction may be obtained to prevent persons attending lectures, from taking notes and publishing such lectures for profit without the author's consent(*b*); also to restrain the publication of private letters without leave of the person who wrote them, or, in case of his death, without the leave of his executor(*c*), and from printing and publishing any private manuscript or unpublished work, without the consent of the author or proprietor(*d*). If a person under the pretence of writing a criticism upon an author's work, copies out the most attractive parts of it, and so large a quantity of the text as to injure and interfere with the sale of the work, the author or proprietor is entitled to an injunction(*e*). But where the reviewer or critic takes no more than is reasonably sufficient for a mere review or critique, an injunction will be refused(*f*). A fair abridgment is in certain cases allowable, but not where it is merely colorable or evasive, and is so far a reproduction of the original work as to injure the sale of it(*g*).

An injunction may also be obtained to restrain an infringement of the statutory copyright in printed books, including maps(*h*), lectures, dramatic literary property and musical compositions, sculpture, useful and ornamental designs, prints and engravings, paintings, drawings and photographs(*i*). It is maintainable by the grantee or assignee of a printed work, although he has not paid the author the price agreed

(*y*) Fernie *v.* Young, L. R., 1 Eng. & Ir. App. 63.
(*z*) Daw *v.* Eley, L. R., 3 Eq. Ca. 496.
(*a*) Betts *v.* Willmott, L. R., 6 Ch. App. 239.
(*b*) Abernethy *v.* Hutchinson, *ante*, p. 13.
(*c*) Thompson *v.* Stanhope, Ambl. 737. See Hopkinson *v.* Ld. Burghley, L. R. 2 Ch. App. 447. Woolsey *v.* Judd, 4 Duer, 379, 396.
(*d*) Queensbury (Duke of) *v.* Shebbeare, *ante*, p. 13. Prince Albert *v.* Strange, *ante*, p. 13. Macklin *v.* Richardson, Ambl. 694. See Crowe *v.* Aikin, 2 Biss. 215.
(*e*) Campbell *v.* Scott, 11 Sim. 31. Saunders *v.* Smith, 3 Myl. & Cr. 711. Bramwell *v.* Halcomb, 3 Ib. 737.
(*f*) Bell *v.* Walker, 1 Bro. Ch. C. 450.
(*g*) Tonson *v.* Walker, 3 Swanst. 672; *ante*, p. 51, *et seq.*
(*h*) Stannard *v.* Lee, L. R., 6 Ch. App. 346; *ante*, p. 57.
(*i*) *Ante*, p. 51, *et seq.*

upon for the writing of the work(*j*); but before the court will interfere in his favor, it must be shown that he has a good legal title to the copyright(*k*). Where a person, being about to publish a periodical publication under a certain title, and knowing another publisher was engaged in the production of a periodical under a similar title, allowed the latter to continue his preparations without objection, and himself advertised it, it was held that he could not restrain the latter from using the title, although as a matter of fact his periodical was published first(*l*).

1446 *Injunction to restrain the sale or detention of chattels.*—Where specific chattels necessary for conducting a particular business are in the possession of persons who claim a lien upon them, and threaten an immediate sale, the court will interfere by injunction, and give the debtor an opportunity of redeeming his property(*m*). And a court of equity has also jurisdiction to enforce a right of stoppage in transitu(*n*). The Court of Bankruptcy also has jurisdiction, under the Bankruptcy Act, 1869, 32 & 33 Vict. c. 71, to prevent by injunction a third person from dealing with property fraudulently assigned before a bankruptcy(*o*).

1447 *Effect of lâches and delay in applying for an injunction.*—The court, in the exercise of its discretion with regard to the granting of an injunction, will, as we have seen, be influenced by any *lâches* or delay which may have taken place in the institution of the proceedings(*p*). Long delay may amount to absolute proof of acquiescence in the act complained of, and will, if unexplained, certainly throw considerable doubt on the reality of the alleged injury(*q*).

1448 *Acquiescence precluding a plaintiff from relief.*—A man who lies by while he sees another person expend his capital and bestow his labor upon any work which he claims to have a right to prevent, without giving that person any notice or attempting to interrupt him, and who thus acquiesces in proceedings inconsistent with his own claims, will in vain ask for an injunction, the effect of which would be to render all the expense useless which he voluntarily suffered to be incurred(*r*).

(*j*) Cox *v.* Cox, 11 Hare, 118.

(*k*) Stevens *v.* Benning, 24 Law J., Ch. 153; *ante*, p. 51, *et seq.* Addison on Contracts, 6th ed., 120, 121.

(*l*) Maxwell *v.* Hogg, L. R., 2 Ch. App. 307.

(*m*) North *v.* Gt. Northern Rail. Co., 69; 29 Law J., Ch. 301.

(*n*) Schotsmans *v.* Lanc. and York. Rail. Co., L. R., 2 Ch. App., 332.

(*o*) *Ex parte* Anderson, L. R., 5 Ch. App. 473.

(*p*) Bridson *v.* Benecke, 12 Beav. 1. Bovill *v.* Crate, L. R., 1 Eq. Ca. 388.

(*q*) *Ante*, pp. 257-260, 320. Ware *v.* Regent's Canal Co., 3 De G. & J. 230. Wicks *v.* Hunt, 1 Johns. 372.

(*r*) Parrott *v.* Palmer, *ante*, p. 320. Birmingham Canal Co. *v.* Lloyd, 18 Ves. 515. Cotching *v.* Bassett, *ante*, p. 259. Maxwell *v.* Hogg, *supra*.

Where there was a parol agreement for the making of a watercourse through the defendant's land, for a certain consideration to be paid to the latter, and the watercourse was made and used for some time, and the parties could not afterwards agree upon the amount to be paid for the easement, and the defendant then stopped up the watercourse, an injunction was granted to restrain him from interfering with the plaintiff's use of it, and it was referred to the master to ascertain the amount that ought to be paid for the enjoyment of the privilege(*s*).

1449 *Of the statutory obligation upon the Court of Chancery to decide all questions of law and fact on the determination of which the title to relief in equity depends.*—Formerly, when an injunction was granted for the protection of a legal right, and a question was raised as to the existence of the right, the court made the continuance of the injunction dependent upon an action being brought to try the right, or it required the complainant first to establish his title at law, and suspended the grant of the injunction until the result of the legal investigation had been ascertained(*t*); but the Chancey Amendment Act, 15 & 16 Vict. c. 86, s. 62, provides, that in cases where it is the practice of the court to decline to grant equitable relief until the legal title or right of the parties seeking such relief has been established in a proceeding at law, the court may itself determine such title or right without requiring the parties to proceed at law to establish the same; and the 21 & 22 Vict. c. 27, s. 3, provides for the trial of questions of fact arising in any suit or proceeding in Chancery, either before a common or special jury, or (s. 5) before the court itself without a jury(*u*). When the trial takes place before a jury, the court has the same powers, jurisdiction and authority as any judge of any of the superior courts sitting at *nisi prius*. But this provision does not, by its reference to proceedings at common law, impose limits upon the right of appeal previously existing upon questions both of law or fact, against any order made by the Court of Chancery(*v*). Nor does it give the defendant a right *ex debito justitiæ* to have his case tried by a jury, where, as in a patent case, a trial by the judge alone is preferable(*x*.)

And by 25 & 26 Vict. c. 42, s. 1, it is enacted, that in all cases in which any relief or remedy within the jurisdiction of the courts of Chancery is sought in any cause or matter instituted or pending

(*s*) Devonshire (Duke of) *v.* Elgin, 20 Law J., Ch. 495. See *ante*, p. 186.

(*t*) Earl Ripon *v.* Hobart, 3 Myl. & K. 177. Clowes *v.* Beck, 13 Beav. 354; 20 Law J., Ch. 505. Bacon *v.* Jones, 4 Myl. & Cr. 436.

(*u*) See Simpson *v.* Holliday, L. R., 1 App. Ca. 316.

(*v*) Curtis *v.* Platt, L. R., 1 App. Ca. 337.

(*x*) Bovill *v.* Hitchcock, L. R., 3 Ch. App. 417.

in either of the said courts, and whether the title to such relief or remedy be, or be not, incident to, or dependent upon, a legal right, any question of law or fact cognizable in a court of common law, on the determination of which the title to such relief or remedy depends, *shall* be determined by or before the same courts(*y*). But whenever it shall appear (s. 2) that any question of fact may be more conveniently tried by a jury at the assizes, or at any sitting in London or Middlesex for the trial of issues, the court may, nevertheless, direct any issue to try the question at the assizes, or at a sitting for the trial of issues in London or Middlesex(*z*). All the provisions with reference to the trial of questions of fact by courts of Chancery, contained in the Chancery Amendment Act, 1858, 21 & 22 Vict. c. 27 (*ante*, p. 1227), apply to the determination of questions of fact under this act. But the court is not bound to grant relief in any matter respecting which a court of common law has concurrent jurisdiction, if it shall appear that such matter has been improperly brought into equity, and that the same ought to have been left to the sole determination of a court of common law; 25 & 26 Vict. c. 42, s. 4. This section applies to cases where there has been some interference with the plaintiff's rights, but not sufficient to entitle the plaintiff to an injunction(*a*).

This act of parliament renders it compulsory upon the courts of Chancery to decide the whole question brought before them, both as regards the legal title of the parties, and the claim to equitable relief(*b*). The act applies not merely to rights, but to remedies given by the courts of equity, and does away with the power of refusing or postponing remedies until the legal title has been established by a trial at law(*c*). But there is nothing in the act which authorizes the court to transfer to itself an action actually pending in a court of law(*d*), or to take cognizance of wrongs and interfere by injunction, when the act complained of has been done, and the question whether the act is wrongful or not depends upon matters of fact and law, for the trial of which no tribunal is so fit as a jury having the assistance of a judge to direct them(*e*).

(*y*) See Fernie v. Young, *ante*, p. 1231.
(*z*) See Roskell v. Whitworth, L. R., 5 Ch. App. 459.
(*a*) Durell v. Pritchard, L. R., 1 Ch. App. 244.
(*b*) Fernie v. Young, *ante*, p. 1231.
(*c*) Hooper, *In re*, 32 Law J., Ch. 55.
(*d*) Curlewis v. Carter, 33 Law J., Ch. 370.
(*e*) Att.-Gen. v. United King. Tel. Co., 30 Beav. 267; 31 Law J., Ch. 339. Dowling v. Beijemann, 2 Johns. & H. 544.

1450 *Of the remedy by injunction at common law.*—By 17 & 18 Vict. c. 125, s. 79, it is enacted, that in all cases of injury where the party injured is entitled to maintain, and has brought, an action, such party may indorse upon the writ and copy to be served, a notice that the plaintiff intends to claim a writ of injunction, and the plaintiff may thereupon claim a writ of injunction against the repetition or continuance of such injury, or the committal of any injury of a like kind; and he may also, in the same action, include a claim for damages, or other redress, and judgment may be given (s. 18) that the writ of injunction do or do not issue, as justice may require. In case of disobedience, such writ of injunction may be enforced by attachment by the court, or, when the courts shall not be sitting, by a judge. The claim of the injunction, however, in the writ and declaration, is merely a preliminary formality to enable the plaintiff to ask for an injunction at the proper time, and it cannot therefore be pleaded to(*f*).

It is further provided (s. 82), that it shall be lawful for the plaintiff, at any time after the commencement of the action, and whether before or after judgment, to apply *ex parte* to the court or a judge for a writ of injunction to restrain the defendant, in such action, from the repetition or continuance of the wrongful act, or the committal of any injury of a like kind, relating to the same property or right; and the writ may be granted or denied by the court, or judge, upon such terms as to the duration of the writ, keeping an account, giving security, or otherwise, as to the court or judge shall seem reasonable and just(*g*). In case of disobedience, the writ may be enforced by attachment by the court, or when the court is not sitting, by a judge. But the order, or any writ issued by virtue thereof, may be discharged, or varied, or set aside by the court, on the application of any party dissatisfied with the order.

The court will, by injunction under this statute, compel a wrongdoer to pull down a building, or remove a wall obstructing ancient windows, and will, in certain cases, retain the writ in the office, on the defendant undertaking to pull down so much of a building as may be necessary (in the opinion of a surveyor, to be selected by the parties or nominated by a judge), to restore to the plaintiff the full enjoyment of the light and air he previously possessed(*h*). The practice in equity is to direct an issue to try the right, and that an account be taken in the meantime, and to grant an interlocutory injunction until

(*f*) Booth *v.* Taylor, L. R., 1 Exch. 51.
(*g*) As to costs, see Grindley *v.* Booth, 34 Law J., Exch. 135.
(*h*) Jessel *v.* Chaplin, 2 Jur. N. S. 931; 4 W. R. 610.

the cause is determined, and the courts of common law will mould their proceedings as nearly as possible in accordance with the proceedings in equity(*i*).

There being no appeal from the exercise of this jurisdiction, the courts are slow to exercise it, where the applicant can obtain an adequate remedy by action (although repeated actions may be necessary), and in cases to which the powers of the Court of Common Pleas to grant an injunction under the Railway and Canal Traffic Act (17 & 18 Vict. c. 31, s. 3), are especially applicable(*k*).

When once an injunction has been obtained under s. 82 of this statute (17 & 18 Vict. c. 125), it is in itself a continuing injunction, and, if it is disobeyed at any time, the plaintiff may apply to the court, or, if the court be not sitting, to a judge, to enforce obedience to it by attachment(*l*).

The court has no power to grant an injunction in an action of ejectment(*m*).

1451 *Injunction at common law to restrain infringements of patent-right and copyright.*—By the Patent Law Amendment Act, 15 & 16 Vict. c. 83, s. 42, it is enacted, that in any action in the superior courts for the infringement of letters patent, it shall be lawful for the court in which the action is pending, or, if the court be not sitting, then for a judge of such court, on the application of the plaintiff or defendant, to make an order for an injunction, etc.; and by 25 & 26 Vict. c. 68, s. 9, it is further enacted, that in any action for an infringement of copyright in paintings, drawings, and photographs, in the superior courts, the court in which the action is pending, or a judge of the court, if the court is not sitting, may make an order for an injunction.

Where the plaintiff, in the first count of his declaration, alleged that the defendant wrongfully took, and kept possession of, certain photographic plates of the plaintiff for printing portraits, and printed and sold portraits therefrom and thereby rendered the plates less valuable to the plaintiff, and deprived him of the profits he would have derived from printing and selling portraits from the said plates; and in a second count charged the defendant with detaining the said photographic plates, and claimed a return of them, or their value, and 10*l.* for their detention, and 1000*l.* in respect of the causes of action in the first count mentioned, and also claimed an injunction to restrain

(*i*) Gittins *v.* Symes, 15 C. B. 362.
(*k*) Sutton *v.* South-East. Rail. Co., L. R., 1 Exch. 32.
(*l*) De La Rue *v.* Fortescue, 2 H. & N. 324; 26 Law J., Exch. 339.
(*m*) Baylis *v.* Le Gros, 26 Law J., C. P. 176.

the defendant from continuing to print portraits from the said plates, it was held that the plaintiff was entitled to recover damages on both counts of his declaration, and was also entitled to an injunction(n).

1452 *Injunctions and orders to stay proceedings.*—If any action, suit, or proceeding is commenced, or prosecuted, in disobedience of a writ of injunction, rule, or order from the superior courts, or a judge thereof, the proceeding will be utterly null and void, and the parties prosecuting it will be liable to an attachment, 15 & 16 Vict. c. 76, s. 226. The court also will stay proceedings after order made, and before the writ of injunction is actually issued(o).

SECTION II.

OF THE REMEDY BY PROHIBITION FOR THE PREVENTION OF JUDICIAL WRONGS.

1453 *The writ of prohibition* is a writ issuing out of Chancery(p), or one of the superior courts at Westminster, directed to the judge or officers of an inferior court, prohibiting them from intermeddling with, or executing, anything of which, by law, they ought not to take cognizance. The object of the writ is to enforce the due administration of justice by keeping all inferior courts within the limits and bounds of their several jurisdictions, as defined by the laws, customs, and statutes of the realm(q). Where an inferior court proceeds in a course properly within its jurisdiction, no prohibition can be awarded till the pleadings raise some issue which the court is incompetent to try. But where the foundation for the jurisdiction is itself defective, a prohibition may be applied for at once(r).

(n) Mayall v. Higby, 31 Law J., Exch. 329; 1 H. & C. 148; *ante*, pp. 56-58.

(o) Corbett v. Ludlam, 11 Exch. 450; 25 Law J., Exch. 25.

(p) See *Re* Bateman, L. R., 9 Eq. Ca. 660.

(q) Bac. Abr. PROHIBITION. Prohibitions del Roy, 12 Co. 63-64. See State v. Third District Court, 16 La. An. 185; Baldwin v. Cooley, 1 S. C. 256; *Ex parte* Smith, 34 Ala. 455.

(r) See Mayor of London v. Cox, L. R., 2 H. of L. Ca. 239. Before the writ will lie a plea to the jurisdiction must have been interposed in the court below and overruled. Hanger v. Keating, 26 Ark. 51. *Ex parte* Little Rock, 26 Ark. 52. *Ex parte* McMeechen, 7 Eng. 70. Unless it appears upon the face of the proceedings that the court below could have no jurisdiction. Arnold v. Shields, 5 Dana, 18. The writ lies to prevent the exercise of unauthorized power in a cause or proceeding of which the inferior tribunal has jurisdiction as well as where the entire cause is without the jurisdiction of such court. Quimbo Appo v. People, 20 N. Y. 531.

The writ of prohibition, therefore, from the Queen's courts at Westminster, still goes to the ecclesiastical courts(*s*), as well as to the courts of admiralty(*t*), courts-martial, county courts, courts baron, the Vice-Chancellor's court, the court of the Earl Marshal, the Lord Mayor's court, courts of quarter sessions, municipal councils, and to all magistrates, sheriffs, commissioners, and persons acting in a judicial capacity, to restrain their proceedings when they are acting, or are about to act, in excess of their jurisdiction(*u*). It lies also in certain cases to restrain the proceedings of courts of criminal jurisdiction, and will be granted to prevent a coroner holding an inquest from extending his inquiries beyond the proper limits of his office(*v*).

When the act sought to be prohibited is not a judicial act, a prohibition will not lie(*w*); but all acts based upon a decision judicial in its nature, and affecting either a public or a private right, are judicial acts; such as an order by church-building commissioners to stop up a footpath through a churchyard(*x*); or the apportionment of a county-rate by commissioners(*y*); or an order of sessions regulating the fees of the clerk of the peace(*z*).

1454 *Prohibition before judgment.*—Wherever the case is of such a nature as to show on the face of the proceedings a want of jurisdiction in the inferior court, it is the bounden duty of the superior court to issue the writ of prohibition in whatever stage of the proceedings below that fact is made manifest, either by the Crown or by any one of its subjects. The misconstruction of an Act of Parliament by an inferior tribunal, whereby it is about to do something which it is not authorized to do, is one of these cases; the enforcement of a rate or tax imposed without lawful authority is another(*a*).

When it appears from the very form of an information or plaint, and particulars of a cause of action in the inferior court, that the court has no jurisdiction in the matter, the party served with the process may at once apply for a prohibition, without entering any appearance, or

(*s*) 2 Inst. 598, 599.

(*t*) James *v.* Lond. and South-West. Rwy., L. R., 7 Exch. 187, 287.

(*u*) Bac. Abr., PROHIBITION(1). Birch, *In re*, 15 C. B. 743. Chabot, *In re*, 17 Law J., Q. B. 336. Church *v.* Inclos. Com., 31 Law J., C. P. 201. Mayor of London *v.* Cox, *supra*.

(*v*) Reg. *v.* Herford, 29 Law J., Q. B. 249.

(*w*) Death, *Ex parte*, 18 Q. B. 647; 21 Law J., Q. B. 337. Reg. *v.* Salford, 18 Q. B. 667. State *v.* Clark County Court, 41 Mo. 44. Home Ins. Co. *v.* Flint, 13 Minn. 244.

(*x*) Reg. *v.* Arkwright, 12 Q. B. 960.

(*y*) Reg. *v.* Aberdare Canal Co., 14 Q. B. 854.

(*z*) Reg. *v.* Coles, 8 Q. B. 75.

(*a*) Burder *v.* Veley, 12 Ad. & E. 263. Veley *v.* Burder, ib. 311. White *v.* Steel, 13 C. B., N. S. 231; 31 Law J., C. P. 265. Foster *v.* Foster, 32 Law J., Q. B. 314.

taking any steps to defend himself in the court below(*b*), or he may appear and take the objection, and go for a prohibition, in case the judge rules against him. When the defect of jurisdiction is not made manifest at the commencement of the proceedings by the plaintiff himself, but depends upon certain questions of fact, the defendant may bring before the court the facts depriving it of jurisdiction, and object to any further proceeding in the matter, and go for a prohibition, if the judge comes to an erroneous decision upon the facts before him, and assumes to have jurisdiction when in point of law he has none(*c*).

Cases are to be met with where the courts have refused to grant writs of prohibition upon motion, where the question of the cause of action having arisen within or without the limits of a limited jurisdiction might be raised by plea in the court below, and the question, being one of fact, seemed proper for the decision of the inferior court, and there was no reason to suppose that it would come to a wrong conclusion and exceed its jurisdiction(*d*); but the court will grant the writ even in these cases, if it deems it advisable; and it is laid down that the writ ought to go in any stage of the proceedings below, if the superior court see sufficient reason to suppose that the inferior court is exceeding, or is about to exceed, its jurisdiction(*e*).

1455 *Prohibition after judgment and execution.*—"The king's courts at Westminster," observes Lord Coke, "being informed either by the parties themselves, or by any stranger, that any court, temporal or ecclesiastical, doth hold plea of that whereof they have not jurisdiction, may lawfully prohibit the same, as well after judgment and execution as before"(*f*). If goods seized in execution still remain in specie in the hands of the bailiffs, or the sheriff or officer of the court, the writ may command that they release the distress, and restore the goods to the party from whom they have taken them(*g*). But when goods seized under an execution no longer exist in specie in the hands of the officer, but have been sold, and the proceeds paid over to the execution creditor, the suit in the inferior court is at an end; everything

(*b*) De Haber *v.* Queen of Portugal, 20 Law J., Q. B. 489. Crompton J., Manning *v.* Farquharson, 30 L. J., Q. B. 22. Mayor of London *v.* Cox, *supra*.

(*c*) *Ante*, pp. 860-862. Jackson *v.* Beaumont, 11 Exch. 300. Hardy *v.* Walker, 23 Law J., Exch. 57.

(*d*) Joseph *v.* Henry, 19 Law. J., Q. B. 369. Reg. *v.* Twiss, L. R., 4 Q. B. 407; 38 L. J., Q. B. 228.

(*e*) Cox *v.* Mayor, etc., of London, 32 Law J., Exch. 285; 1 H. & C. 338; L. R., 2 H. of L. 239.

(*f*) 2 Inst. 602. Kimpton *v.* Willey, 1 L. M. & P. 280.

(*g*) Fitz. Nat. Brev. 46a. Jones *v.* Owen, 18 Law J., Q. B. 8.

has been done that can be done, and no prohibition can then be issued or enforced, for there is nothing left to prohibit(*h*).

"If it appears," observes Lord Mansfield, "upon the face of the proceedings, that the court below have no jurisdiction, a prohibition may be issued at any time, either before or after sentence, because all is nullity; it is *coram non judice*. But where it does not appear upon the face of the proceedings, if the defendant below will lie by, and suffer that court to go on under an apparent jurisdiction, it would be unreasonable that this party who, when defendant below has thus lain by, and concealed from the court below a collateral matter, should come hither after sentence against him there, and suggest that collateral matter as a cause of prohibition, and obtain a prohibition against it after all this acquiescence in the jurisdiction of the court below"(*i*).

1456 *Prohibition where appeal lies.*—It is no ground for refusing a writ of prohibition to show that the party applying for it has a power of appeal, or has appealed, against the decision of the court below, for "the power of prohibition is in no case taken away by the privilege of appeal"(*k*).

1457 *Prohibition to the ecclesiastical courts* to restrain their proceedings in a matter or cause before them will be granted whenever it is shown that the court has done, or is about to do, something contrary to the general law of the land, or manifestly beyond the jurisdiction of the court; but not to correct mere irregularities of practice(*l*), or misconstruction of the canons of the church, in matters not affecting the rights and liberties of the subject at common law(*m*).

The principle on which the writ goes to the spiritual court, as stated by Blackstone(*n*), is the danger of a different decision of the same rights, and even of the same identical interests by different courts, "an impropriety, he observes, which no wise government can, or ought

(*h*) Denton *v.* Marshall, 33 Law J., Exch. 91. Poe, In re, 5 B. & Ad. 681. The writ has been granted against the sheriff and judgment creditor, to withhold the collection of a judgment rendered by a court having no jurisdiction, although the court had ceased to exist, and the sheriff had resigned, the execution having been issued but not returned. Ingersoll *v.* Buchanan, 1 West Va. 181.

(*i*) Buggin *v.* Bennett, 4 Burr. 2037. Yates *v.* Palmer, 1 D. & L. 288. Ld. Abinger, Roberts *v.* Humby, 3 M. & W. 122; *ante*, pp. 1145-1146.

(*k*) Ld. Denman, C.J., Burder *v.* Veley, 12 Ad. & E. 263. Jackson *v.* Beaumont, 11 Exch. 300; 24 Law J., Exch. 301. To the contrary, People *v.* Wayne, 11 Mich. 393. People *v.* Clute, 42 How. (N. Y.) 157. People *v.* Marine Court, 35 Barb. 341. State *v.* La Crosse, 11 Wis. 50. *Ex parte*, Smith, 28 Ala. 94.

(*l*) 2 Inst. 599-617. Bull, N. P. 218. Gould *v.* Capper, 5 East, 365. Burder *v.* Veley, 12 Ad. & E. 261. Story, *Ex parte*, 8 Exch. 201; 22 Law J., Exch. 38. Richards *v.* Dyke, 3 Q. B. 256. Home *v.* Camden, 2 H. Bl. 533, per Eyre, C.J.

(*m*) Titchmarsh *v.* Chapman, 1 D. & L. 732.

(*n*) Vol. III., pp. 112, 113.

to, endure, and which is, therefore, a ground of prohibition"(*o*). The writ is granted not only where a plain and manifest excess of jurisdiction has been claimed or exercised by the court, but also in cases where, although the subject-matter is of ecclesiastical cognizance, yet the party would receive some wrong or injury by the course of proceeding in the ecclesiastical court, or be deprived of some benefit or advantage to which the common or statute law would have entitled him. One class of those cases is, where such court is proceeding to try a matter which is triable only by the common law, as a custom, prescription, or *modus*. Another, where, in a case of spiritual cognizance, a collateral question arises which is not properly of spiritual cognizance, in which case the courts of common law oblige the ecclesiastical court to admit such evidence as the common law would allow(*p*); as when a lease is offered to be proved in an ecclesiastical court, and is rejected because by their law two witnesses are required. Another, where the spiritual court takes upon itself the construction of statute law, and decides contrary to the construction which is put upon the statute by the temporal courts. And many instances are found where the ecclesiastical courts have been prohibited from enforcing church-rates, although that was a matter within their jurisdiction(*q*). But all compulsory proceedings for enforcing such rates are now abolished, as has been previously mentioned.

A prohibition will also go to the ecclesiastical courts to prevent them from taking cognizance of any suit or proceeding for defamation and slander, or for brawling in a church or churchyard; which were formerly matters of ecclesiastical cognizance(*r*), but have now been removed from the jurisdiction of the spiritual courts(*s*).

1458 *Notwithstanding an appeal entered* in a superior court of ecclesiastical jurisdiction, the writ of prohibition will go to the inferior spiritual court to stop the appeal, and all further proceedings in the matter; for "there is no reason," observes Lord Denman, "for driving the subject to the expensive process of appealing from one spiritual court to another, to abide the chance of a repetition of the error, which, if committed, can at last be rectified only by prohibition, and may be

(*o*) Burder *v.* Veley, 12 Ad. & E. 259.

(*p*) Breedon *v.* Gill, 1 Ld. Raym. 219, 222.

(*q*) Jeffrye's case, 5 Rep. 67 b. 17 Vin. Abr. PROHIBITION, H. pl. 4. 2 Roll. Abr. Ib. pl. 5; Ib. K. pl. 1, 10. Blank *v.* Newcomb, 12 Mod. 327. Rogers *v.* Davenant, 1 Mod. 194; 2 Mod. 8. Anon. 12 Mod. 416. Veley *v.* Burder, 12 Ad. & E. 311.

(*r*) Evans, *Ex parte*, 2 Dowl. N. S. 726.

(*s*) 18 & 19 Vict. c. 41; 23 & 24 Vict. c. 32; but brawling by persons in holy orders is still within the cognizance of the spiritual courts. Ibid.

so committed as to be placed beyond the reach even of that remedy." If the party has appealed, the superior court not only may, but must, prohibit, wherever the error involving the want of jurisdiction is apparent upon the face of the proceedings, "though repeated adjudications to the same effect have been made in the courts below, and even after the solemn sentence of a spiritual court on final appeal"(*t*).

1459 *The writ of prohibition to restrain a county-court judge* from further proceeding in a matter over which he has no jurisdiction, is a writ of right to which a person is entitled *ex debito justitiæ*. If the want of jurisdiction appears upon the face of the proceedings, "the courts of Westminster Hall have no discretion to award or refuse the writ, but are bound to award it"(*u*). And if the defect does not appear upon the face of the proceedings, the facts and circumstances depriving the court of jurisdiction may be brought before the superior court by affidavit; and the court is bound to issue the writ on fair and reasonable ground being shown for it(*x*). The writ lies only where the county court has assumed to act without or beyond its jurisdiction. It does not lie where the county court is the tribunal to decide in the first instance upon some preliminary matter and there has been no hearing nor decision at all upon it(*y*), nor does it lie to protect an injured party from the consequences of a mistake made by the judge upon a question of fact(*z*), or in point of law(*a*). A mistake in the latter respect would, ordinarily speaking, be matter of error; but the Act creating the county courts has taken away that form of remedy. Therefore, where the defendant, having been summoned to the county court in an action for goods sold and delivered, set up as a defence that the plaintiff had already recovered judgment against him for the same debt in another court, and the plaintiff admitted that it was so, and the county-court judge nevertheless overruled the defence, and gave judgment for the plaintiff, the court refused to rule for a prohibition, saying that the decision of the judge was final, whether it was right or wrong(*b*).

We have seen that every judge of an inferior court must have some

(*t*) Burder *v.* Veley, 12 Ad. & E. 260, 263. White *v.* Steel, 12 C. B., N. S. 383; 31 Law J., C. P. 368.

(*u*) Burder *v.* Veley, 12 Ad. & E. 256.

(*x*) Jackson *v.* Beaumont, 11 Exch. 302; *ante*, p. 860.

(*y*) *Re* Skipton Industrial, etc., Society *v.* Prince, 33 Law J., Q. B. 323. There must be a suit pending, not threatened. Mealing *v.* City Council, Dudley, 321.

(*z*) Robinson *v.* Lenaghan, 2 Exch. 337.

(*a*) Lexden Union (Guardians of) *v.* Southgate, 23 Law J., Exch. 316. See Farrow *v.* Hague, 33 Law J., Exch. 258; People *v.* Marine Court, 35 Barb. 341; State *v.* Nathan, 4 Rich. 513.

(*b*) Toft *v.* Rayner, 5 C. B. 162. Smith *v.* Mayor of London, 6 Mod, 78.

cause of action, charge, or complaint before him, into which he has authority to inquire, or his proceedings will be extra-judicial(*c*); but if a county-court judge having a plaint before him for a cause of action within his jurisdiction, finds a verdict for the plaintiff without a particle of evidence to support it, this is, it seems, no ground for a prohibition(*d*). It would be desirable, however, that there should be some means of preventing a verdict or judgment from being enforced under such circumstances.

If the claim in the county court is substantially for a matter excluded from its jurisdiction, but the plaint and particulars are framed so as to show a cause of action within its jurisdiction, the superior court will look beyond the record in the county court to ascertain the real nature of the claim(*e*); and if that appears to be not within the cognizance of the court, a prohibition will be granted. Thus, where a plaintiff in his plaint and particulars sued for a debt of 18*l*., for money paid and for loss of time in attending before magistrates for, and on behalf of, the defendant, and it appeared that the action was brought to recover expenses incurred by the plaintiff by reason of his having been wrongfully summoned before certain magistrates at the instance of the defendant, it was held that the cause of action, if any existed, was for a malicious prosecution, over which the county court had no jurisdiction, and the plaintiff could not, by putting down the items of his expenses and pecuniary loss, concoct a debt for the purpose of giving an apparent colorable authority to the county-court judge to take cognizance of the matter(*f*).

If, under color of proceeding upon a plaint for a trespass by false imprisonment, the complainant and the court proceed to try what is in substance and effect an action for a malicious prosecution, a prohibition will issue to prevent any proceeding being taken upon the judgment. Thus, if the defendant, upon a suspicion of felony, has made a complaint and charge to the police, upon which they have themselves acted, and taken the plaintiff into custody, then, as trespass for false imprisonment is not maintainable for that, but an action on the case, a prohibition will go to the county court, if it proceeds to try and give judgment. But where the defendant has expressly directed the constable to take the plaintiff into custody, and has thereby rendered himself amenable to an action of trespass for an assault and false

(*c*) Hopper, *In re*, *ante*, p. 773; and see *ante*, p. 840.
(*d*) Lexden Union *v.* Southgate, 23 Law J., Exch. 316.
(*e*) *Ante*, pp. 860-862.
(*f*) Hunt *v.* North Staff. Rail. Co., 2 H. & N. 451; 26 Law J., Exch. 374.

imprisonment, and the plaintiff brings his plaint for that act of trespass only, the county court has jurisdiction to try it, though the other circumstances in the case would properly be the subject of an action for a malicious prosecution(*g*). So, previous to the late Act conferring an equitable jurisdiction on county courts (*ante*, 2, 1141), plaints in such courts for legacies or shares of a residuary estate bequeathed by will have been prohibited(*h*).

If a plaintiff, having one entire cause of action for an amount exceeding what the county court is entitled to take cognizance of, splits his cause of action into divers causes of action, and founds thereon divers suits in the county court, a prohibition will be granted to stop the unlawful proceedings(*i*). But it is competent for a plaintiff to abandon the excess of his claim above 50*l*., in order to give the county court jurisdiction, by giving notice of abandonment to the defendant on or before the hearing of the cause(*k*); but the abandonment must be made either by the plaintiff himself, or by some person authorized on his behalf. The judge has no power to make the abandonment at the trial as an act of his own, and if he does so all proceedings upon the judgment may be arrested by prohibition(*l*).

We have seen that, in certain cases, a plaintiff in the county court may, by leave of the judge, sue in the district where the cause of action or part of it arose. If, therefore, an action is brought in the county court of any other district, the progress of the suit may be arrested by prohibition, unless the defendant dwells or carries on his business in the district, as previously mentioned(*m*).

When a question of title to land, or to any incorporeal hereditament, beyond the value to which the jurisdiction of the county court is limited (*ante*, p. 1140), is raised before such court, or any other inferior tribunal, having no power to adjudicate upon the question, it is the duty of the court, as we have seen, to inquire into the facts, so far as may be necessary to enable them to ascertain whether the title really does come in question, and whether the amount is beyond their jurisdiction; but if they come to a wrong conclusion, and proceed to hear

(*g*) Chivers *v.* Savage, 5 Ell. & Bl. 701. Guest *v.* Warren, *ante*, p. 1159.

(*h*) Beard *v.* Hine, 10 W. R. 45. Hewston *v.* Phillippe, 11 Exch. 689; 25 Law J., Exch. 185 Longbottom *v.* Longbottom, 8 Exch. 208; 22 L. J., Exch. 76. Pears *v.* Wilson, 8 Exch. 833.

(*i*) Grimbly *v.* Ackroyd, 17 Law J., Exch. 157. Catchmade's case, 6 Mod. 91. Kimpton *v.* Willey, 9 C. B. 719.

(*k*) Isaac *v.* Wyld, 7 Exch. 163. The county-court rules require notice of the abandonment to be entered on the particulars of demand, R. 43. See North *v.* Holroyd, *post*, p. 1252.

(*l*) Hill, *In re*, 10 Exch. 726; 24 Law J., Exch. 137. Hopper, *In re*, *ante*, p. 773.

(*m*) *Ante*, p. 1137. Barnes *v.* Marshall, 18 Q. B. 785. Buckley *v.* Hann, 5 Exch. 43. Wilde *v.* Sheridan, 21 Law J., Q. B. 260. And see Newcombe *v.* De Roos, 29 Law J., Q. B. 4.

and adjudicate when they ought not to have done so, all proceedings upon the judgment may be stayed by prohibition(*n*).

A county-court judge can neither give himself jurisdiction where he has it not, nor deprive himself of jurisdiction where he has it, by an erroneous decision on a matter of fact. A writ of prohibition sometimes issues to a county-court judge to prohibit him from proceeding in one direction, in order to compel him to exercise his judicial functions in another direction, where he has declined jurisdiction, and was wrong in so doing(*o*).

Where a county-court judge having heard, and adjudicated upon, a plaint before him, and given a verdict for the defendant, afterwards and after the judgment had been recorded, and the parties had left the court, rescinded his decision, and ordered the cause to be adjourned to the next court, and then gave judgment for the plaintiff, it was held that, having decided the case in the first instance, he was *functus officio*, and could not afterwards alter his judgment; that he had therefore exceeded his authority in giving the second judgment, and that a prohibition must go to restrain all proceedings thereon. But the judge may alter his judgment before it is recorded, and the record may be amended to correct a mistake, provided it be done the same day, and at the same court, in the presence of the parties(*p*).

If a county-court judge has entertained an application for a new trial, and pronounced his decision upon it, and entered his judgment of record, he cannot rescind his judgment, and entertain a fresh application(*q*).

A prohibition cannot be issued to the county court after execution, and a levy and a payment of the amount thereof to the execution-creditor; for the action is then at an end, and, there being no further proceeding to be taken in the matter, there is nothing to prohibit(*r*).

Whenever objection is taken to the jurisdiction of a county-court judge, it is his duty to set out the facts upon the record, so that the superior courts may see the grounds upon which he proceeded, and the subject may not be left without the redress to which he is by law entitled(*s*). He ought to assist parties in obtaining their right to a decision of the superior court(*t*).

(*n*) Thompson *v.* Ingham, Chew *v.* Holroyd, *ante*, p. 1141. Knowles *v.* Holden, 24 Law J., Exch. 223. Lawford *v.* Partridge, *ante*, p. 1140.
(*o*) Hardy *v.* Walker, 23 Law J., Exch. 57.
(*p*) Jones *v.* Jones, 17 Law J., Q. B. 170.
(*q*) Mossop *v.* Gt. Northern Rail. Co., 16 C. B. 580; 17 ib. 130.
(*r*) Denton *v.* Marshall, 32 Law J., Exch. 91; 1 H. & C. 654. Poe, *In re*, 5 B. & Ad. 681. Robinson *v.* Lenaghan, 2 Exch. 363.
(*s*) Parke, B., Pears *v.* Wilson, 6 Exch. 838.
(*t*) Martin, B., Mungean *v.* Wheatley, 6 Exch. 102. Jackson *v.* Beaumont, 11 ib. 208.

1460 *Prohibition to the Lord Mayor's Court* cannot be issued when the question of jurisdiction depends upon a matter of fact proper for the determination of that court, and the want of jurisdiction does not appear upon the face of the proceedings; for by the Mayor's Court of London Procedure Act(*u*) it is enacted, that "no defendant shall be permitted to object to the jurisdiction of the court, in or by any proceeding whatever, except by plea." Where, therefore, a person was sued for a debt in the Lord Mayor's Court, and it appeared that no part of the cause of action arose within the locality over which the court had jurisdiction, it was held that the defendant must raise the objection to the jurisdiction by plea, and that the court must decide upon it, and that a prohibition to prevent it from so doing could not be granted(*v*). But this does not apply to a garnishee who is sued in the Lord Mayor's Court, who may apply for a prohibition in the first instance accordingly(*w*).

1461 *Proceedings in prohibition.*—By 1 Wm. 4, c. 21, s. 1, it is enacted, that an application for a prohibition may be made on affidavits only, and in case the party applying shall be directed to declare in prohibition, the declaration shall be expressed to be on behalf of such party only, and not on his behalf and that of the Crown, and shall set forth in a concise manner so much only of the proceedings in the court below as may be necessary to show the ground of the application, and shall conclude by praying a writ of prohibition; to which declaration the defendant may demur or plead such matters as may be proper, to show that the writ ought not to issue, and the party in whose favor judgment shall be given shall be entitled to costs, etc.(*x*); and in case a verdict shall be given for the party plaintiff, it shall be lawful for the jury to assess damages. "The legislature," observes Erle, C.J., "has not given us the slightest intimation what kind of damages is here meant. Perhaps what was intended was to give damages in case execution had issued in the court below, and the goods of the plaintiff in prohibition had been taken by a proceeding which afterwards turned out to be contrary to law. I am, however, clearly of opinion that the legislature did not intend that the plaintiff, who declares in prohibition, should recover as damages the costs of the

(*u*) 20 & 21 Vict. c. clvii. s. 15.

(*v*) Manning *v.* Farquharson, 30 Law J., Q. B. 22.

(*w*) Cox *v.* Mayor, etc., of London, 1 H. & C. 338; 32 Law J., Exch. 285; L. R., 2 H. of L. Ca. 239. See Banque de Credi Commercial *v.* De Gas, L. R., 6 C. P. 142.

(*x*) Where, therefore, the rule for a prohibition is made absolute without pleadings, there is no "judgment" within the meaning of the section, and the applicant is not entitled to his costs. *Ex parte* Overseers of Everton, L R., 6 C. P. 245.

proceedings in the ecclesiastical court, upon a verdict on the prohibition in his favor"(*y*)

1462 *The application for a prohibition* may be made to either of the superior courts, or to a judge at chambers; but, except under special circumstances, it should be made to the latter in the first instance. During vacation the application may be made to the Court of Chancery(*z*). The affidavit used in moving for the rule should set forth the facts necessary to support the application, and should be entitled in the court to which the judge before whom the application is made belongs, but should not be entitled in any cause(*a*). But after a rule has been granted, the affidavits used in showing cause may be entitled in the cause(*b*). The judge's decision, if he refuses a rule, may be reviewed as in ordinary cases(*c*).

1463 *The rule or summons to show cause why a writ of prohibition should not issue to a county court* operates as a stay of proceedings in the cause, if the superior court or judge so directs, until the determination of the rule or summons, or until the superior court or judge thereof otherwise orders; and the judge of the county court is required to adjourn the hearing of the cause until the matter is determined. When the writ is issued to the judge of the county court, the matter is now finally disposed of by rule or order, and no declaration or further proceedings in prohibition are allowed(*d*).

1464 *Notice of the issue of the writ* must be given to the opposite party, and the writ lodged with the registrar of the county court, when the writ is issued to that court, two clear days before the hearing of the cause, or the judge may order the party obtaining the writ to pay the costs of the day, unless some order respecting costs has been made by the judge or court above(*e*).

1465 *Refusal of writ when final.*—When a superior court or a judge thereof has refused to grant a writ of prohibition to the county court, no other superior court or judge can grant the writ. But the party going before a judge in the first instance, may appeal from his decision to the court, and a second application may be made to the same court or

(*y*) White *v.* Steel, 32 Law J., C. P. 2; 13 C. B., N. S. 325.
(*z*) *Re* Bateman, L. R., 9 Eq. Ca. 660.
(*a*) Evans, *Ex parte*, 2 D., N. S. 410; 12 Law J., Q. B. 68.
(*b*) Breedon *v.* Capp, 9 Jur. 781. Corner's Crown Pr., PROHIBITION.
(*c*) 13 & 14 Vict. c. 61, s. 22. Chitt. Arch. Pr., 11th ed., 1725, PROHIBITION.
(*d*) 19 & 20 Vict. c. 108, ss. 40, 42. As to costs in the county court, ib. ss. 40, 41. As to prohibition in copyright cases in the county court, 21 & 22 Vict. c. 70, s. 9.
(*e*) 19 & 20 Vict. c. 108, s. 41.

judge, on grounds different from those on which the first application was founded(*f*).

1466 *Of the setting aside writs of prohibition issuing out of Chancery.*—By the 12 & 13 Vict. c. 109, it is enacted (s. 39), that in every action, suit, and proceeding on the common-law side of the Court of Chancery, it shall be lawful for the superior courts of common law, and the judges thereof, and they are thereby required, to hear and determine all matters and applications incident to such actions, etc.; and it has been held that the superior courts have jurisdiction under this statute, to set aside a writ of prohibition improperly issued out of the Court of Chancery to a county court(*g*).

SECTION III.

OF THE REMEDY BY CERTIORARI.

1467 *The writ of certiorari* is a writ issued out of Chancery(*h*), or out of the Court of Queen's Bench, or some one or other of the Queen's courts at Westminster, for the purpose of removing some cause, suit, or proceeding from an inferior to the superior court, either for the purpose of examining into the legality of the proceedings, or annulling or quashing an order or judgment of such inferior court given in a matter over which the court had no jurisdiction, or for the purpose of giving a defendant, sued in such inferior court, surer and more certain justice, before a higher tribunal.

1468 *Where the inferior court has jurisdiction* to try the cause, but it is sought to remove it on the ground that it is a fit matter for the decision of a superior court (*post*, pp. 1250, 1251), the writ must be obtained and served before issue has been joined in the inferior court, and before the first juryman has been sworn(*i*), except in those cases where the writ is applied for with the view for enforcing in the superior court the judgment of an inferior tribunal(*j*).

(*f*) 19 & 20 Vict. c. 108, s. 44.

(*g*) Baddeley *v.* Denton, 4 Exch. 866; Chitt. Arch. Pr., 11th edit., part xii.

(*h*) See Davies *v.* McHenry, L. R., 5 Eq. Ca. 200; 6 ibid. 468.

(*i*) 43 Eliz. c. 5, s. 2; 21 Jac. 1, c. 23, s. 2. Laverack *v.* Bean, 3 M. & W. 62. Holroyd, J., Walker *v.* Gann, 7 D. & R. 772. Williams, J., Kemp *v.* Balne, 1 D. & L. 865.

(*j*) Chitt. Arch. Pr., 11th edit., CERTIORARI. A county-court judgment is not removable for the purpose of having execution thereon. Moreton *v.* Holt, 10 Exch. 767; 24 Law J., Exch. 169.

1469 *Where the inferior court has no jurisdiction*, on the other hand, over the cause or matter brought before it, the writ may be applied for after judgment and execution (*ante*, pp. 1239, 1240), if the want of jurisdiction appears upon the face of the proceedings, or exception to the jurisdiction was taken at the trial, and the circumstances depriving the court of authority in the matter were brought to the knowledge of the judge (*ante*, pp. 773, 774, 829, 830), and the objection was improperly overruled, and judgment wrongfully given against the defendant (*ante*, pp. 774, 777, 860, 862); but where the want of jurisdiction does not appear upon the face of the proceedings, and no objection to the jurisdiction was raised by the defendant in the court below, until after the matter had been decided against him (*ante*, pp. 829, 830, 1145, 1146), or the defendant has failed to draw the attention of the judge to the facts and circumstances depriving him of jurisdiction, the court will not, as we have seen (*ante* pp. 773, 774, 842), grant the writ, or interfere in the matter. Thus, where an application was made for a certiorari to bring up an order of sessions for payment of costs, for the purpose of quashing it, on the ground that the costs were taxed after the sessions had expired, and the authority of the court had ceased(*k*), but it appeared that the applicant had attended the taxation, and made no objection thereto whilst it was going on, it was held that he had waived the right to object, and had no claim to the writ(*l*); for wherever a party makes no objection to the jurisdiction of the court whilst the case is proceeding, but apparently acquiesces, and suffers the court to act without protest or objection, as if it had jurisdiction, down to actual judgment, it is then too late to apply for a certiorari, unless the defect appears upon the face of the proceedings(*m*).

1470 *Limitation of time for issuing the writ.*—By 13 Geo. 2, c. 18, no writ of certiorari is to be granted to remove any conviction, etc., before a justice of the peace, unless such certiorari be applied for within six calendar months next after the conviction shall be made(*n*). But there is no general rule of practice, except in those cases, which requires the application for the certiorari to be made within that time(*o*).

1471 *Grounds for the issue of the writ* may be established either by show-

(*k*) Reg. *v.* Long, 1 Q. B. 740.
(*l*) Watkins, *Ex parte*, 10 W. R. 249; *ante*, pp. 1145, 1146. Freeman *v.* Read, *ante*, p. 1145.
(*m*) Yates *v.* Palmer, 1 D. & L. 288.
(*n*) As to the casual absence of the judge on the last day for making the application. Reg. *v.* Allen, 33 Law J., M. C. 98.
(*o*) Reg. v. Mayor of Sheffield, L. R., 6 Q. B., 652.

ing that the inferior court had no power to adjudicate upon the matter brought before it, or that it has exceeded its authority in adjudicating upon it, and that objection was taken to the jurisdiction before the court gave judgment in the matter(*p*), or that difficult and important questions of law will arise, and have to be decided, or that a fair trial cannot be had, or an impartial jury be obtained, or that the judge or magistrate who has adjudicated had some personal interest in the subject-matter of the suit or proceeding(*q*). A certiorari is never granted where a procedendo cannot be awarded. Where, therefore, a magistrate gives notice that he objects to be sued in the county court (*ante*, p. 871), and by so doing puts an end to the proceedings there, he cannot afterwards remove them into the superior court(*r*). Nor will it be granted to remove a provisional order of a secretary of state, under 21 & 22 Vict. c. 98, empowering a local board to put in force the Lands Clauses Act, with respect to the purchase of land; such an order having no validity till confirmed by Act of Parliament(*s*).

The writ lies at common law, as we have seen, for the purpose of removing convictions and orders of magistrates made without jurisdiction, although the writ is expressly taken away by statute (*ante*, pp. 857–860), for a legislative prohibition of removal by certiorari applies only to cases which the inferior court has authority to try, and not to causes which are not within the cognizance of the inferior tribunal(*t*). A writ of certiorari is not granted as of course, either when applied for on behalf of the Crown, or where the applicant applies as one of the public, but where the applicant has, by reason of his local situation or otherwise, a peculiar grievance of his own, the writ is grantable *ex debito justitiæ*(*u*).

1472 *Certiorari to remove causes from the county court.*—When the claim in the county court exceeds 5*l.*, and the court has jurisdiction over the subject-matter of the action, the issue of the writ is discretionary with the judge of the superior court to whom the application is made, and is not a matter of right. It is to be granted upon such terms as to payment of costs, and giving security for debt or costs, or such other terms as the judge shall think fit; 9 & 10 Vict. c. 95, s. 90.

(*p*) Rees *v.* Williams, 7 Exch. 51.
(*q*) Reg. *v.* Suffolk, 18 Q. B. 416; *ante*, p. 880.
(*r*) Weston *v.* Sneyd, 1 H. & N. 703.
(*s*) Frewen *v.* Hastings Local Board, 34 Law J., Q. B. 159. And see Reg. *v.* Newborough, L. R., 4 Q. B. 585; 38 L. J., M. C. 129.
(*t*) Reg. v. Badger, 6 Ell. & Bl. 137.
(*u*) Reg. *v.* Justices of Surrey, L. R., 5 Q. B. 466.

The 13 & 14 Vict. c. 61, s. 14, giving a right of appeal to some one or other of the superior courts, from the decision of the county court judge, in cases where the amount claimed exceeds 20*l.* (*infra*), and enacting (s. 16) that no judgment, order, or determination of any judge of a county court, nor any cause or matter brought before him, or pending in his court, shall be removed by appeal, motion, writ of error, certiorari, or otherwise, into any other court whatever, save and except in the manner and according to the provision thereinbefore mentioned, does not affect the right of removal by certiorari, where the damages claimed exceed 5*l.*; for by s. 2 of that statute it is declared, that that Act, and the 9 & 10 Vict. c. 95, shall be read and construed as one Act, just the same as if the several provisions of the former statute, not inconsistent with the provisions of the later statute, were repeated and re-enacted therein. "The provision of the Act of 9 & 10 Vict. c. 95, is by no means inconsistent," observes Parke, B., "with the right of appeal given by 13 & 14 Vict. c. 61, ss. 14, 15. They may both well stand together, and, therefore, the last-named statute is to be read as if that clause were in it"(*x*). The writ of certiorari, therefore, for the removal of a cause from the county court, where the damages claimed exceed 5*l.*, is untouched by the 13 & 14 Vict. c. 61, s. 16(*y*).

Where the claim does not exceed 5*l.*, and the court has jurisdiction to try the cause, a certiorari can only be obtained in cases which the court, or a judge, deem fit to be tried in the superior court, and where the party applying for the writ gives security, to be approved of by one of the masters, for the amount of the claim and the costs of the trial, not exceeding in all 100*l.*; and assents to such terms as the court or judge may think fit to impose; 19 & 20 Vict. c. 108, s. 38(*z*).

When the writ is sought for on the ground that the county court has no jurisdiction in the matter, it is grantable *ex debito justitiæ*, and as a matter of right, on fair ground being shown for contending that the court has no jurisdiction(*a*).

1473 *Of the concurrent remedy by appeal and by certiorari—County court appeals.*—By 13 & 14 Vict. c. 61, s. 14, a right of appeal against the decision of the county court judge is given, whenever the amount recoverable by action in the county court exceeds 20*l.*, and the defendant is "dissatisfied with the determination of the court in point

(*x*) Parker *v.* Brist. and Ex. Rail. Co., 6 Exch. 184; 20 Law J., Exch. 112. Brookman *v.* Wenham, 20 Law J., Q. B. 278; 2 L. M. & P. 233.

(*y*) Box *v.* Green, 9 Exch. 503.

(*z*) As to the mode of giving security, see ss. 70, 71.

(*a*) Jackson *v.* Beaumont, 11 Exch. 300; *ante*, p. 1138, *et seq.*

of law, or upon the admission or rejection of any evidence;" but notice must be given within ten days to the opposite party, or his attorney, and security must also be given for costs, or the appeal cannot be heard(*b*). The right to have such security given may however be waived(*c*). It is not the amount for which the action is brought that determines the right of appeal, but "the amount recoverable," or the sum that may reasonably be expected to be recovered(*d*). The plaintiff cannot abandon part of his claim at the trial by permission of the judge, so as to deprive the defendant of his right of appeal(*e*). By 30 & 31 Vict. c. 142, s. 13, an appeal may be brought in actions of ejectment, or in which title comes in question, and by leave of the judge in actions "in which an appeal is not now allowed," if the judge thinks fit.

The statutory power of appeal does not, as we have seen, in anywise abridge the common-law right of a party to a certiorari(*f*); and if an appeal has been actually entered, a certiorari may, nevertheless, be obtained for the purpose of annulling an order or judgment on the ground of want of jurisdiction, or excess of jurisdiction(*g*).

1474 *The application for the writ* should be made to a judge at chambers in the first instance, and not to the court(*h*); and an appeal lies from his decision to the full court. A certiorari to remove a plaint from the county court may issue on an *ex parte* application, without notice to the opposite party(*i*); but when it is sought for to remove an order of justices, or an order of sessions, six days' notice of the application must be given in the manner previously mentioned, to the justice or justices making the order, or to two justices present at the sessions when the order was made(*k*). The application must be made by, or in the name of, the party aggrieved by the order or proceeding, and not by any other person, not being his attorney or agent duly authorized to act on his behalf(*l*).

1475 *Affidavits when necessary.*—When the application for the writ is founded on the want of jurisdiction, and the defect appears upon the face of the proceedings, an affidavit is not necessary for the support of the application; but every suggestion that does not appear upon

(*b*) Stone *v.* Dean, E. B. & E. 504; 27 Law J., Q. B. 319.
(*c*) Park Gate Iron Co. *v.* Coates, L. R., 5 C. P. 634.
(*d*) Mayer *v.* Burgess, 4 Ell & Bl. 655.
(*e*) See North *v.* Holroyd, L. R., 3 Exch. 69.
(*f*) *Ante*, p. 48, 856, 871.
(*g*) Jackson *v.* Beaumont, 11 Exch. 300; *ante*, p. 1242.
(*h*) Robertson *v.* Womack, 19 Law J., Q. B. 367. Bowen *v.* Evans, 3 Exch. 111. Staples *v.* Accid. Death Ins. Co., 10 W. R. 59. And see Corner's Crown Pr., CERTIORARI.
(*i*) Symonds *v.* Dimsdale, 2 Exch. 533.
(*k*) Reg. *v.* Suffolk, 18 Q. B. 416.
(*l*) Reg. *v.* Riall, 11 Ir. C. L. R. 280.

the face of the proceedings, but is collateral and out of the proceedings, ought to be verified by affidavit(*m*). All the material facts of the case should be stated by affidavit, that the judge may be able to impose such terms upon the parties as he, in the exercise of his discretion, may think requisite(*n*). The rule for the writ is absolute in the first instance(*o*).

1476 *Notice of the issue of the writ* must be given, and the writ itself lodged with the registrar, as in the case of the issue of a writ of prohibition(*p*).

1477 *The effect of the issue of the writ* is to stay all proceedings in the inferior court, if the superior court or judge thereof so directs, as in the case of the issue of a prohibition(*q*). It is the duty of a county-court judge to receive and yield obedience to the writ, and do all that is necessary to be done for the removal of the cause; and if he fails to do so, the court will issue an attachment against him(*r*).

1478 *The effect of the refusal of a writ of certiorari*, and the power of making a second application, is the same as in the case of the application for a writ of prohibition(*s*).

1479 *Proceedings after removal.*—After the cause has been removed by certiorari, the plaintiff may proceed or not, as he thinks fit(*t*).

1480 *Quashing of the writ—Procedendo.*—If the writ of certiorari has been improvidently issued in a case where it did not lie(*u*); or if it has been misdirected, or is otherwise bad in law; or if it appears from the admission of the party suing it out, that he issued it merely for the purpose of delay(*x*); or if it is shown that the rules and practice of the court have not been complied with, the writ may be quashed, and a procedendo awarded, which is a writ sending the case back for trial to the inferior court. The writ of procedendo may be granted *ex parte* by a single judge at chambers; and it is in his discretion whether the order for the issue of the writ shall be made upon a summons to show cause, or immediately(*y*). The writ of procedendo may, in its turn, be quashed, and the cause again remanded to the superior court, on the ground that the procedendo itself has been improvidently awarded(*z*).

(*m*) Buggin *v.* Bennett, 4 Burr. 2037; *ante*, pp. 860-862, 906. Corner's Crown Pr., AFFIDAVITS.
(*n*) Parker *v.* Brist. and Ex. Rail. Co., 6 Exch. 184.
(*o*) Pawsey *v.* Gooday, 3 Dowl. 605. Dowding *v.* Gt. West. Rail. Co., 3 Jur. N. S. 1130.
(*p*) 19 & 20 Vict. c. 108, s. 41, *ante*, p. 1247.
(*q*) Ibid. s. 40, *ante*, p. 1247.
(*r*) Mungean *v.* Wheatley, 6 Exch. 88.
(*s*) 19 & 20 Vict. c. 108, s. 44, *ante*, p. 1248.
(*t*) Garton *v.* Gt. West. Rail. Co., *ante*, p. 1220.
(*u*) Rees *v.* Williams, 21 Law J., Exch. 24.
(*x*) Landens *v.* Shiel, 3 Dowl. 90.
(*y*) Reg. *v.* Scaife, 18 Q. B. 773; 21 Law J., M. C. 231. Corner's Crown Pr., PROCEDENDO.
(*z*) Chitt. Arch. Pr., 11th edit., CERTIORARI.

CHAPTER XXIV.

OF THE REMEDY BY MANDAMUS.

SECTION I.—*Of the remedy by mandamus for the vindication of rights and the enforcement of the performance of public duties.*—The prerogative writ of mandamus—Mandamus to judicial officers to hear and adjudicate—Mandamus to ministerial officers, and to overseers and rectors—Of the granting of the writ where there is another remedy—Mandamus to compel the surrender of public documents, or to restore to a public freehold office—How a freehold office may be forfeited and vacated—Offices held at will—Visitatorial power excluding the proceeding by mandamus—Mandamus to restore the name of a medical practioner to the medical register,—to test the validity of an election,—to elect corporate and public officers,—to enforce an appointment to a public or corporate office,—to make calls,—to levy rates and discharge judgment-debts, etc.,—to make compensation for lands taken and injuries inflicted in the exercise of statutory powers—Laches and delay in applying for the writ—Proceedings upon a mandamus—Conditions precedent to the issue of the writ—Parties to whom the writ is to be directed—Service of the writ—Time for taking objections—Pleas to the return—Damages and costs—Actions and informations for a false return—Judgment non obstante veredicto—Attachment for disobedience of peremptory writ.

SECTION II.—*Of the claim to a writ of mandamus in an action at common law.*—Of the union of an action in respect of a private injury with a claim for a mandamus—Actions in which a claim for a mandamus may be sustained—Actions in which a claim for a mandamus cannot be sustained—The declaration in the action—Pleadings—Damages—Costs—Orders for the rectification of registers of shareholders.

SECTION I.

OF THE REMEDY BY MANDAMUS FOR THE VINDICATION OF RIGHTS, AND THE ENFORCEMENT OF THE PERFORMANCE OF PUBLIC DUTIES.

1481 *The prerogative writ of mandamus* is a writ issuing in the Queen's name from the Court of Queen's Bench, directed to some chartered,

corporate or public body, or official, or other person, commanding the performance of some public act or duty, therein specified, in the performance of which the party claiming the writ is interested, or by the non-performance of which he is aggrieved or injured(*a*). It was termed a prerogative writ because the power to award it rested with the justices of the Court of Queen's Bench, in which court the sovereign is supposed to be personally present(*b*). Through the medium of this writ the Court of Queen's Bench exercises control over all public officers, corporations, chartered companies, and persons intrusted with extensive powers for public purposes, and enforces the exercise of such powers within reasonable limits, more especially where there is no other efficient or convenient remedy(*c*). The issue of the writ is in the discretion of the court and will not be ordered, if the effect of it will be to enable some persons to avoid the performance of some duty which they ought in equity to perform(*d*).

1482 *Mandamus to enforce statutory, corporate, and public duties and obligations.*—Whenever the law requires a thing to be done, and the public at large are interested in the doing of it, a mandamus will go to order it to be done by the person upon whom the obligation of doing it is imposed. If he is to act according to his discretion, and he will not act or even consider the matter, the court may compel him to put himself in motion to do the thing, though it cannot control his discretion(*e*). Permissive words, authorizing a thing to be done, are often held to be directory and compulsory, when the power or authority has

(*a*) Reg. *v.* Chichester (Bishop of), 29 Law J., Q. B. 23. Briggs, *Ex parte*, 28 ib. 272. In this country a writ of mandamus does not issue by virtue of any prerogative power. Kentucky *v.* Dennison, 24 How. (U. S.) 66.

(*b*) Com. Dig. MANDAMUS, A.

(*c*) Ld. Denman, C.J., Reg. *v.* East. Co. Rail. Co., 10 Ad. & E. 531.

(*d*) Reg. *v.* Garland, L. R., 5 Q. B. 269. That the issuing of the writ is discretionary, and not a matter of right, see Woodman *v.* Somerset, 11 Shep. 151; Goings *v.* Mills, 1 Pike, 11; People *v.* Dowling, 55 Barb. 197; Moody *v.* Fleming, 4 Ga. 115; Van Rensselaer *v.* Sheriff of Albany, 1 Cow. 501; People *v.* Supervisors of Westchester, 15 Barb. 608; People *v.* Hatch, 33 Ill. 9; State *v.* Graves, 19 Md. 351; Stickney, *Ex parte*, 48 Ala. 160; Weber *v.* Zimmerman, 23 Md. 45; People *v.* Booth, 49 Barb. 31.

(*e*) Best, J., Rex *v.* North Riding, etc., Justices, 2 B. & C. 291. Rex *v.* Kent Justices, 14 East, 395. Rex *v.* Cumberland Justices, 1 M. & S. 194. Mason County *v.* Minturn, 4 W. Va. 300. Burke *v.* Munroe County, 4 W. Va. 371. Appling *v.* Bailey, 44 Ala. 333. *Ex parte* South, etc., R. R. Co., 44 Ala. 654. Tilden *v.* Sacramento County, 41 Cal. 68. Mayor, etc. *v.* Rainwater, 47 Mass. 547. Seymour *v.* Ely, 37 Conn. 103. People *v.* Hubbard, 22 Cal. 34. State *v.* Robinson, 1 Kansas, 188. Green *v.* Purnell, 12 Md. 329. Houston *v.* Levy Court, 5 Harring. (Del.) 108. Lamar *v.* Marshall, 21 Ala. 772. Gunn *v.* Pulaski County, 3 Pike, 427. Elkins *v.* Athearn, 2 Den. 191. State *v.* Warmouth, 23 La. An. 76. Hutchinson *v.* Commissioners of Canal Fund, 25 Wend. 692. Ferris *v.* Morris, 2 N. J. 161. Black *v.* Auditor, 26 Ark. 237. *Ex parte* Hayes, 26 Ark. 510. McMillen *v.* Smith, 26 Ark. 613. Swan *v.* Gray, 44 Miss. 393. State *v.* Wilson, 49 Mo. 146. Hall *v.* Supervisors of Oneida, 19 Johns. 259. People *v.* Supervisors of Dutchess, 1 Hill, 50.

been given in order that it may be exercised for the public benefit, and the public interests manifestly require the authority to be acted upon(*f*).

Thus, where the charter of incorporation of an ancient town, conferring various municipal privileges on the town, provided "that the mayor and jurats *may*, for the future, hereafter have and hold, and have power to hold, a court of record, to hear and determine all pleas, actions, complaints, etc.," it was held that the words were compulsory, and that they were bound to hold the court for the benefit of the inhabitants(*g*). So a mandamus will go to the mayor and assessors of a borough, commanding them to hold a court to revise the list of burgesses(*h*).

But permissive words will receive their natural meaning, and will not be made obligatory, unless it plainly appears from the general context of the instrument in which they are found that they were intended to be obligatory, or unless it be shown that the public interests manifestly require such a construction to be put upon them. Railway Acts, incorporating railway companies, and authorizing the construction of a railway, are, in general, merely permissive. They confer extensive powers for the compulsory purchase of land, and the construction of works for the benefit of the public, but it is, in general, discretionary with the companies whether they will exercise the whole or a portion of these powers, or refrain altogether from using them(*i*). And when the words of a statute or charter are imperative, and command the thing to be done, it is, nevertheless, a good excuse to show that circumstances have arisen rendering the exercise of the statutory power and command impracticable(*j*); or, in cases of pri-

(*f*) Com. Dig. PARLIAMENT, E. 22. People *v.* Common Council of Brooklyn, 22 Barb. 404. People *v.* Supervisors of Otsego County, 51 N. Y. 401. Dwarris on Stat. 604. Supervisors *v.* United States, 4 Wall. 435. City of Galena *v.* Amy, 5 Wall. 705. Mayor, etc., of the City of New York *v.* Furzee, 3 Hill, 612.

(*g*) Rex *v.* Mayor of Hastings, 1 D. & R. 148; 5 B. & Ald. 692, n. Rex *v.* Avering Atte Bower, ib. 691. Rex *v.* Wells (Mayor of), 4 Dowl. P. C. 562.

(*h*) Reg. *v.* Mayor, etc., of Monmouth, L. R., 5 Q. B. 251.

(*i*) York & North Mid. Rail. Co. *v.* The Queen, 1 Ell. & Bl. 861; 22 Law J., Q. B. 225. Gt. West. Rail. Co. *v.* The Queen, 1 Ell. & Bl. 874. Erle, J., Reg. *v.* North Mid. Rail. Co., ib. 903. Rex *v.* Birm. Can. Nav., 2 W. Bl. 708. See *post*, pp. 1277-78. A railroad corporation may, in a proper case, be compelled to complete its road by mandamus. State *v.* Southern Minnesota R. R. Co., 18 Minn 40.

(*j*) Reg. *v.* Lond. & North.-West. Rail. Co., 16 Q. B. 884. Reg. *v.* Ambergate, etc., 1 Ell. & Bl. 381; 22 Law J., Q. B. 191; *post*, p. 1283. Mandamus will not lie to compel the performance of a legal duty when performance is impossible. Ackerman *v.* Desha County, 27 Ark. 457. State *v.* Burbank, 22 La. An. 318. State *v.* Waterman, 5 Nev. 323. State *v.* Lehre, 7 Rich. (S. C.) 234.

Nor will it issue to compel an officer to perform a duty where his power to perform it is not complete, but depends upon the action or approval of some other authority. Ball *v.* Lappins, 3 Oregon, 86.

vate Acts of Parliament, not imposing a duty relating to the public interest, that a previous agreement had been made by the person applying for the performance of the duty, not to exact its performance(*k*). With reference to the inferential repeal of a previous statute by a subsequent one, the principle is, that a *general* Act is not to be construed to repeal a previous *particular* Act unless there is some express reference to the previous legislation on the subject, or the two Acts are necessarily inconsistent(*l*).

1483 *Mandamus to judges, magistrates, and judicial officers, commanding them to hear and adjudicate.*—We have seen that, by 11 & 12 Vict. c. 44 (*ante*, p. 719), more simple means (by rule to show cause) than the ordinary remedy by mandamus have been devised for compelling justices of the peace to exercise the duties of their office, where the legality of their proceedings is likely to be called in question, and they refuse to act by reason of doubts entertained by them as to the extent of their authority and jurisdiction; or make an arbitrary and illegal use of their discretion, etc.(*m*). The proceeding established by this statute is cumulative upon the ordinary common-law remedy by mandamus, which still goes to courts of quarter session(*n*), recorders of boroughs, justices of the peace, and judges of inferior courts of record (other than county court judges), to compel them to fulfil the duties of their several offices, and receive, hear, and adjudicate upon an information, claim, or dispute brought before them, and which they have refused to hear and adjudicate upon, from some erroneous view of the law, or of the extent of their powers and jurisdiction(*o*); but where they have entered upon the matter and given the parties a hearing, and have decided, the court will not, by mandamus, review their decision, or compel them to rehear the case on the ground that they have come to a wrong conclusion in point of law(*p*). That

(*k*) Savin *v.* Hoylake Rail. Co., L. R., 1 Exch. 9.

(*l*) Thorpe *v.* Adams, L. R., 6 C. P. 125.

(*m*) Reg. *v.* Boteler, 33 Law J., M. C. 101.

(*n*) As to the costs of the application, see Reg. *v.* Kent Justices, 36 Law J., M. C. 130.

(*o*) Reg. *v.* Richards, *ante*, p. 863. Reg. *v.* Richmond Recorder, Ell. Bl. & Ell. 353. Reg. *v.* Newport Guardians, 33 Law J., M. C. 155.

(*p*) Reg. *v.* Leicester Deputies, 15 Q. B. 674. Reg. *v.* Goodrich, 19 Law J., Q. B. 413. Reg. *v.* Blanshard, 13 Q. B. 325. Reg. *v.* Liverpool Recorder, 20 Law J., M. C. 37. Buller, *Ex parte*, 1 Jur. N. S. 709. Reg. *v.* East Riding Just., 13 Jur. 447.

A writ of mandamus cannot perform the functions of an appeal or writ of error. *Ex parte* Newman, 14 Wall. 152. *Ex parte* Bostwick, 1 Cow. 143. Jansen *v.* Davison, 2 Johns. Cas. 73. State *v.* Taylor, 19 Wis. 566.

It does not issue to correct judicial errors. Weeden *v.* Town Council of Richmond, 9 R. I. 138. People *v.* Judges of Dutchess, 20 Wend. 658.

It lies only to compel action; and when once the court has exercised its judgment or discretion, the decision of the court can be reviewed only by appeal or certiorari. Appling *v.*

must be done on appeal, where an appeal is given, or on a case stated for the opinion of the court(*q*); for the Court of Queen's Bench has never, in cases of applications for a mandamus to judges or courts of a judicial character, assumed a power to do more than to direct them to hear and decide; it has never dictated to them in what manner they are to decide"(*r*). Where justices or judicial officers have begun to hear a complaint within their jurisdiction, they are bound to hear the whole of the evidence offered, and have no right to stop a complainant and prevent him from bringing his whole cause of complaint before them(*s*).

The writ of mandamus formerly lay against a county-court judge to compel him to hear and adjudicate upon a claim, and give judgment upon a verdict(*t*). But, by the County Court Acts, the remedy by mandamus against a county court judge, or any officer of the

Bailey, 44 Ala. 383. Mason County v. Minturn, 4 W. Va. 300. Burke v. Munroe County, ib. 371. *Ex parte* Bottoms, 46 Ala. 312. Bleker v. St. Louis Law Commissioner, 30 Mo. 111.

But the question whether a court rightfully refused to entertain jurisdiction of a cause may be reviewed in proceedings for a mandamus. Beguhl v. Swan, 39 Cal. 411.

(*q*) Reg. v. West Riding Just., 1 New Sess. Cas. 247.

(*r*) Cockburn, C.J., Cook, *Ex parte*, 29 Law J., Q. B. 68. Bird, *Ex parte*, 28 ib. Q. B. 228. Seymour v. Ely, 37 Conn. 108. People v. Judges of Dutchess, 20 Wend. 658. Elkins v. Athearn, 2 Denio, 191. State v. Lafayette County Court, 41 Mo. 222. People v. Hubbard, 22 Cal. 34. Howland v. Eldredge, 43 N. Y. 457.

Thus a court cannot be compelled by mandamus to give a specific judgment in a tax assessment case. Miltonberger v. St. Louis County Court, 50 Mo. 172. Or to issue an injunction. McMillen v. Smith, 26 Ark. 613. State v. Wilson, 49 Mo. 146.

Or to grant a motion to quash an attachment. Bottom, *Ex parte*, 46 Ala. 312.

Or to hear an appeal, from a judgment rendered by a justice of the peace, which the court has erroneously dismissed. State v. Wright, 4 Nev. 119. People v. Weston, 28 Cal. 639.

Or to reverse its decision on a motion for a new trial. People v. Circuit Judge of Branch County, 17 Mich. 67.

Or to try a cause begun in that court and transferred by it to a federal court. Francisco v. Manhattan Ins. Co., 36 Cal. 283.

Or to grant or refuse a motion to open a default. Bacon, *Ex parte*, 6 Cow. 392.

Or to grant or refuse to grant a change of venue. People v. Hubbard, 22 Cal. 34. People v. Sexton, 24 ib. 78. But see State v. McArthur, 13 Wis. 407.

Where an attorney has been disbarred in an inferior court for cause over which such court has no jurisdiction, mandamus will lie. Bradley, *Ex parte*, 7 Wall. 364.

Or when the court has decided erroneously on the testimony. State v. Kirke, 13 Fla. 278. And see People v. Justices of Delaware, 1 Johns. Cas. 181; Withers v. State, 36 Ala. 252. But see Randall, petitioner, 11 Allen (Mass.), 473.

Mandamus will lie to compel a circuit judge to receive a verdict which he has improperly refused State v. Knight, 46 Mo. 83.

To pronounce judgment. State v. Judge of Second District Court, 13 La. An. 481. Haight v. Turner, 2 Johns. 371. Horne v. Barney, 19 ib. 247. People v. Justices of Chenango, 1 Johns. Cas. 179. Bostwick, *Ex parte*, 1 Cow. 143. Russell v. Elliott, 2 Cal. 245.

To compel a hearing on a writ of *habeas corpus*. Mahone, *Ex parte*, 30 Ala. 49.

To compel a circuit judge to entertain an appeal from a justice's court. Henderson, *Ex parte*, 6 Fla. 279. Anderson v. Brown, ib. 299.

And to compel judges to hold their courts at the county seat. Calavaras County v. Brockway, 30 Cal. 335.

(*s*) Rex v. Cumberland Justices, 4 Ad. & E. 695.

(*t*) Reg. v. Richards, 20 Law J., Q. B. 252. Brooke v. Ewers, 1 Str. 113. Milner, *Ex parte*, 15 Jur. 1067.

county court, for refusing to do an act relating to the duties of his office, is taken away, and a different remedy, by rule to show cause and order of court is substituted in its place(*u*).

A mandamus will go to the lord of a manor to compel him to hold a court baron, and to the homage to present conveyances of burgage tenure(*v*); also to hold a court leet to swear in a constable, or to admit persons entitled to a franchise(*x*); also to a corporation, to permit a court leet and court baron to be held, according to immemorial custom, in the town hall(*y*); also to justices of the peace, to hear and determine a complaint against overseers for not properly accounting(*z*), to examine and allow overseers' accounts(*a*), and to swear them to their accounts(*b*); to summons parties for not paying(*c*), and to issue distress-warrants for levying poor-rates(*d*).

The court never grants a mandamus except it indisputably appears that the party to whom it is directed has, by law, power to do what he is enjoined to do, and will not compel any person to exercise a doubtful jurisdiction(*e*).

1484 *Mandamus to ministerial officers.*—The writ of mandamus lies also against all ministerial officers, to compel them to execute the duties of their several offices, and discharge the functions delegated to them for the public benefit, although there be a penalty for their neglect(*f*).

(*u*) 19 & 20 Vict. c. 108, s. 43; 21 & 22 Vict. c. 74, s. 4. Furber, *Ex parte*, 27 Law J., Exch. 453. Jardine *v.* Smith, 3 W. R. 464. Reg. *v.* Harwood, 22 Law J., Q. B. 127. Churchward *v.* Coleman, L. R., 2 Q. B. 18.

(*v*) Rex *v.* Montacute (Ld.), 1 W. Bl. 60. Rex *v.* Midhurst, 1 Wils. 283.

(*x*) Rex *v.* Colebrooke, 2 Kenyon, 163. Rex *v.* Milverton (Ld. of), 3 Ad. & E. 284.

(*y*) Rex *v.* Grantham, 2 W. Bl. 716. Rex *v.* Ilchester Bailiffs, etc., 2 B. & C. 764; 4 D. & R. 334.

(*z*) Rex *v.* Worcestershire Justices, 3 D. & R. 299.

(*a*) Rex *v.* Cambridge Justices, 8 Dowl. P. C. 89.

(*b*) Rex *v.* Middlesex Justices, 1 Wils. 125.

(*c*) Anon., 2 Chitt. 257.

(*d*) St. Luke *v.* Middlesex Justices, 1 Wils. 133. Reg. *v.* Cheek, 11 Jur. 86, n. Rex *v.* Middlesex Justices, 2 Kenyon, 163. Rex *v.* Bean, 6 T. R. 198.

(*e*) Rex *v.* Bishop of Ely, 1 W. Bl. 58. Rex *v.* Sillifant, 4 Ad. & E. 351. Reg. *v.* Lond. & North-West. Rail. Co., 6 Rail. Cas. 634. Lee, *Ex parte*, Ell. Bl. & Ell. 863. State *v.* Judge of Second Dist. Court, 13 La. An. 89. Nor will the writ issue to compel the performance of an act, when such performance will involve the party in a doubtful litigation. State *v.* Perrine, 34 N. J. L. 254.

Nor will it issue to command an officer to do what it would not be lawful for him to do without such command. Gillespie *v.* Wood, 4 Humph. 427. Johnson *v.* Lucas, 11 Humph. 306. Or to do that which no statute commands him to do. Puckett *v.* White, 23 Texas, 569. State *v.* County Judge, 7 Clarke (Iowa), 390. Glasscock *v.* Commissioner of General Land Office, 3 Texas, 51. Nor will it issue to command the performance of an act which has been enjoined by a federal court. Fleming, *Ex parte*, 4 Hill, 581.

(*f*) Com. Dig. MANDAMUS, 3I B. R. H. 261. Buck *v.* Lockport, 6 Lans. (N. Y.) 253. Prescott *v.* Gonser, 34 Iowa, 175. Savage *v.* Holmes, 15 La. An. 334.

The principle that mandamus is the proper remedy to compel performance of ministerial acts, applies to ministerial duties of judicial officers. State *v.* Ely, 43 Ala. 568.

Thus it lies to compel the approval of a tax-collector's bond by a probate judge. Id. To

It will go to a gaoler to compel him to give up the body of a deceased prisoner for debt to his executors(*g*), or to receive a prisoner(*h*); to the trustees of a public charity, whose duty it is to furnish a churchwarden with the keys of a chest, enjoining them to deliver the keys(*i*); to justices and clerks of the peace of a borough, to permit a ratepayer to inspect and take copies of a rate(*j*); also to a corporation, commanding them to permit a member of the body corporate to inspect the minute-books, bye-laws, and records of the corporation, for the purpose of determining a matter in controversy between the corporation and the individual member, respecting the rights and privileges of the latter under the charter(*k*). But the court will not by mandamus compel the justices and the clerk of the peace of a county to allow ratepayers an inspection of the accounts and bills of charges of county officers settled and ordered to be paid at the sessions and deposited by the clerk of the peace amongst the county records, the ratepayers having no right to examine such accounts(*l*); nor will the court interfere by mandamus with the administration of the funds of charities(*m*), nor compel trustees of turnpike roads to repair and keep in repair a turnpike road(*n*); nor will a mandamus lie to the king's officer to compel him to deliver up property which he holds in his hands on behalf of the Crown; for a mandamus to the officer in such a case would be like a mandamus to the Crown, which the court cannot grant(*o*).

compel a justice of the peace to make a true record of a judgment rendered by him, and to furnish a copy to a party on a proper demand. Smith *v.* Moore, 38 Conn. 105. To compel the clerk of an inferior court to issue execution. People *v.* Clerk of Marine Court, 3 Abb. Ct. App. Dec. 491. People *v.* Loucks, 28 Cal. 68. And to compel the court to enter up a proper judgment where all the facts necessary to authorize the court to receive, file, and record the authenticated copy of a will, and issue letters testamentary thereon, have been established Williams *v.* Saunders, 5 Cold. (Tenn.) 60.

(*g*) Reg. *v.* Fox, 2 Q. B. 246.

(*h*) R. *v.* Colvill, 34 Law J., M. C. 137. R. *v.* Governors of Whitecross St. Prison, ib. 198.

(*i*) Reg. *v.* Abrahams, 4 Q. B. 161.

(*j*) Rex *v.* Leicester Justices, 4 B. & C. 891.

(*k*) Burton, *In re*, 31 Law J., Q. B. 62.

(*l*) Rex *v.* Staff. Justices, 6 Ad. & E. 84.

(*m*) Rugby Charity, *Ex parte*, 9 D. & R. 214.

(*n*) Reg. *v.* Oxford, etc., Roads, 12 Ad. & E. 497.

(*o*) Rex *v.* Commissioners of Customs, 5 Ad. & E. 380. The authorities are not harmonious as to the right of the judicial branch of a State government to compel the executive branch of such government to perform a ministerial act imposed by the constitution and laws of the State. It has been decided by the courts of last resort in Maine, New Jersey, Illinois, Missouri, Arkansas, Georgia, Rhode Island, Texas and Louisiana, that State courts have no power to compel, by mandamus, the performance of any duty appertaining to the functions of the chief executive officer of the State. State *ex rel.* Oliver *v.* Warmoth, 23 La. An. 1. People *v.* Bissell, 19 Ill. 230. Low *v.* Towns, 8 Ga. 360. Hawkins *v.* Governor, 1 Pike, 570. State *v.* Governor, 1 Dutch. 331. Houston, etc., R. R. Co. *v.* Randolph, 24 Texas, 317. Dennitt, petitioner, 32 Me. 508. Mauran *v.* Smith, 8 R. I. 192.

Thus it has been held that a writ of mandamus will not issue to compel the governor of a

The court will by mandamus compel the performance of a public duty by public officers, although the time prescribed by statute for the performance of the duty has passed(*p*); and if the public officer to whom the performance of the duty belongs has in the meantime quitted his office, and been succeeded by another, it is the duty of the successor to obey the writ, and to do the acts, when required, which his predecessor has omitted to perform(*q*).

In certain cases, however, where a public officer, occupying a subordinate position, has received an order from his superiors, or any competent authority, and is liable to an indictment for disobeying the order, the court has refused to proceed by mandamus, and has left the

State to issue certain interest bonds or certificates which the relator claimed to be entitled to receive under an act of the legislature. State v. Warmoth, 22 La. An. 1. People v. Bissell, 19 Ill. 230.

These decisions are based on the ground that, in the organization of the Federal and State governments, three separate bodies of magistracy were established, with the intention that each should be separate and distinct within its own sphere, and, as far as practicable, independent of the others; and that neither branch can be permitted to exercise the powers appropriately belonging to another.

In some of the other States it has been held that mandamus may issue against the governor of a State to compel the performance of mere ministerial acts. It has been so held in Maryland, Ohio, North Carolina, California, Minnesota. Harpending v. Haight, 39 Cal. 189. McCauley v. Brooks, 16 Cal. 11. Middleton v. Low, 30 Cal. 596. State v. Chase, 5 Ohio St. 535. State v. Maffit, 5 Ham. (Ohio) 358. Colten v. Ellis, 7 Jones' Law (N. C.), 545. Chamberlain v. Sibley, 4 Minn. 309. Magruder v. Swann, 25 Md. 173. See Pacific R. R. Co. v. Governor, 23 Miss. 353.

In Chamberlain v. Sibley, the supreme court of Minnesota says: "This court will not undertake to compel the governor of the State to the performance of any duty devolving upon him as the chief executive, and properly pertaining to his office. But when some official act, not necessarily pertaining to the duties of the executive of the State, and which might as well be performed by one officer as another, is directed by law to be done by the governor, then any person who shows himself entitled to its performance, and has no other adequate remedy, may have a writ of mandamus against such officer, even though the law may have designated the chief executive of the State to perform the duty."

In the case of Marbury v. Madison, 1 Cranch, 137, the supreme court of the United States declare that "it is not by the office of the person to whom the writ is directed, but by the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined." See, also, Kendall v. United States, 12 Pet. 594.

It has been held that, in a proper case, the court may, by mandamus, compel the governor of the State to cause a bill, passed by the legislature and presented to him for approval, to be authenticated as a statute. Harpending v. Haight, 39 Cal. 189. See People v. Yates, 40 Ill. 126. To issue a commission to a person who holds the certificates of the clerks of the counties composing the circuit that he has received the greatest number of votes at an election for circuit judge. Magruder v. Swann, 25 Md. 173. But see State v. Fletcher, 39 Mo. 388.

The secretary of State may be compelled by mandamus to affix his official signature to the commission of a sheriff appointed by the governor. State v. Wrotnowski, 17 La. An. 156. The secretary of the commonwealth of Pennsylvania may be compelled by mandamus to add the appropriate date, and to perform every other necessary act connected with the filing and recording of an instrument in his office. Commonwealth v. Atlantic, etc., R. R. Co., 53 Penn. St. 9.

So the secretary of State may be compelled to furnish copy of the laws to a person holding a contract to print them. State v. Barker, 4 Kans. 379. See, generally, Bryan v. Cattell, 15 Iowa, 538; Houston, etc., R. R. Co. v. Randolph, 24 Texas, 317.

(*p*) Reg. v. Mayor, etc., of Monmouth, *ante*, p. 1257.

(*q*) Rochester (Mayor etc. of) v. Reg., 27 Law J. Q. B. 436. Prescott v. Gonser, 34 Iowa 175. People v. Bacon, 18 Mich. 247. Lindsay v. Auditor, 3 Bush (Ky.), 231.

parties to the ordinary remedies(*r*). Thus, in the ordinary case of disobedience, by surveyors, treasurers, and ministerial officers, of an order of sessions, the proper remedy is by indictment, or by removal of the order into the Court of Queen's Bench(*s*), and not by mandamus(*t*). "The court," observes Lord Kenyon, C.J., "grants a mandamus to justices to make an order when they refuse to do their duty. But it would be descending too low to grant a mandamus to inferior officers to obey that order: we might as well issue a writ to a constable, or other ministerial officer, to compel him to execute a warrant directed to him"(*u*). So a mandamus will not go to a clerk of justices to return a record of all summary convictions pursuant to the 11 & 12 Vict. c. 43, s. 14, although such return ought to be made, and proceedings by rule or indictment might be taken against the justices to enforce it(*v*). But where a ministerial officer is put forward as the nominal party, and a chartered company or corporation is in the background disputing the liability, and is the party really to be acted upon by the mandamus, the court will direct the writ to issue(*w*).

1485 *Mandamus to overseers or clergymen to bury the dead body of a pauper.* —It should seem the individual under whose roof a poor person dies is bound to carry the body decently covered to the place of burial; he cannot keep it unburied, nor do anything which prevents Christian burial; he cannot, therefore, cast it out, so as to expose the body, or offend the feelings, or endanger the health, of the living; and for the same reason he cannot carry it uncovered to the grave. It will probably be found, therefore, that where a pauper dies in any parish-house, poor-house, or union-house, of the parish or union, the overseers of the parish, or the guardians of the union, may be compelled by mandamus to bury the body; but the court will not grant a mandamus to overseers to bury the body of a pauper who has died in a private house in the parish, or in a hospital not belonging to the parish authorities(*x*).

A mandamus to a rector to bury a corpse will be granted if it be shown that the rector has refused altogether to bury it; but there is no common-law right of burial in any particular part of the church-

(*r*) Coleridge, J., Rex *v.* Payn, 6 Ad. & E. 401.
(*s*) 12 & 13 Vict. c. 45, s. 18.
(*t*) Rex *v.* Bristow, 6 T. R. 168. Rex *v.* Jeyes, 8 Ad. & E. 416. Downton Overseers, *Ex parte*, 8 Ell. & Bl. 856.
(*u*) Rex *v.* Bristow, 6 T. R. 170.
(*v*) Hayward, *In re*, 3 B. & S. 546; 32 L. J., M. C. 89.
(*w*) Reg. *v.* Wood Ditton Surveyors, etc., 18 Law J., M. C. 218.
(*x*) Reg. *v.* Stewart, 12 Ad. & E. 773.

yard, and the court will not, by mandamus, enforce private rights of burial in any particular vault (*y*), or in any unusual or extraordinary manner(*z*).

1486 *Of the granting of the writ where there is another remedy.*—It is no answer to an application for a mandamus to enforce the performance of a public duty, to show that the party claiming the writ has another remedy, unless it is also shown that the other remedy would be more suitable and effectual than the proceeding by mandamus(*a*). Where there is another remedy equally convenient, beneficial, and effectual, a mandamus will not be granted. "This is not a rule of law, but a rule regulating the discretion of the court in granting writs of mandamus"(*b*). Thus, where the duty sought to be enforced is the payment of a sum of money, and an action of debt is maintainable for the money, and affords as convenient and effectual a remedy as a writ of mandamus, the court will leave the party to the ordinary remedy by action, and will refuse a mandamus(*c*). So it is no answer to an application for a mandamus to show that the defendant may be proceeded against by indictment(*d*), unless it is also shown that an indictment would be a more effectual and suitable course of proceeding. And the writ is never granted as a remedy for a mere private wrong,

(*y*) Blackmore, *Ex parte*, 1 B. & Ad. 122.

(*z*) Rex v. Coleridge, 2 B. & Ald. 809.

(*a*) Clarke v. Bishop of Sarum, 2 Str. 1062. See La Grange v. State Treasurer, 24 Mich. 468; Buck v. Lockport, 6 Lans. (N. Y.) 253; Harwood v. Marshall, 9 Md. 83.

When the remedy by action is doubtful mandamus will lie. Clark v. Miller, 47 Barb. 38. People v. Head, 25 Ill. 325.

(*b*) Hill, J., Barlow, *In re*, 30 Law J., Q. B. 271. See State v. Nicholson Pavement Co., 35 N. J. L. 396; Mansfield v. Fuller, 50 Mo. 338; State v. Bridgman, 8 Kansas, 458; State v. Meiley, 22 Ohio St. 534; Fitch v. Diarmid, 26 Ark. 482; State v. McAuliffe, 48 Mo. 112; People v. Hawkins, 46 N. Y. 9; Lynch, *Ex parte*, 2 Hill, 45; People v. Stevens, 5 Hill, 616; State v. Stockwell, 7 Kans. 98; Arrington v. Van Houton, 44 Ala. 284; Kans. Civil Code, §§ 688, 689; Louisville, etc., R. R. Co. v. State, 25 Ind. 177; People v. Hatch, 33 Ill. 9; Crandall v. Amador, 20 Cal. 318; Green v. Wood, 35 Barb. 653; Goodwin v. Glazier, 10 Cal. 333; Williams v. Judge of Cooper County Court of Common Pleas, 27 Mo. 225; Trustees v. State, 11 Ind. 205; People v. Thompson, 35 Barb. 73; Morgan v. Monmouth Plankroad Co., 2 Dutch. (N. J.) 99; Wilson v. Moore, 2 Dutch. (N. J.) 458; Commonwealth v. Supervisors of Colley Township, 29 Penn. St. 121; State v. Judge of Sixth District Court of New Orleans, 12 La. An. 342; People v. Olds, 3 Cal. 167; Cullem v. Latimer, 4 Texas, 329; Board of Commissioners v. Hicks, 2 Carter (Ind.), 527; Matter of White River Bank, 23 Vt. 478; Reading v. Commonwealth, 11 Penn. St. 196; People v. Mayor New York, 10 Wend. 393; 25 Wend. 680; Boyce v. Russell, 2 Cow. 444.

(*c*) Reg. v. Hull and Selby Rail. Co., 6 Q. B. 70; 13 Law J., Q. B. 257. Reg. v. Brist. and Exeter Rail. Co., 3 Rail. Cas. 777. Mansfield v. Fuller, 50 Mo. 338.

That an action against a public officer for neglect to perform his duty is not such a remedy as to supersede that by mandamus, see People v. Mead, 24 N. Y. 114; People v. Hawkins, 46 N. Y. 9; McCullough v. Mayor of Brooklyn, 23 Wend. 458; Prescott v. Gonser, 34 Iowa, 175; State v. Dougherty, 45 Mo. 294.

(*d*) Rex v. Severn and Wye Rail. Co., 2 B. & Ald. 650. Reg. v. Brist. Dock Co., 2 Q. B. 70. Reg. v. Vict. Park Co., 1 Q. B. 291. Fremont v. Crippen, 10 Cal. 211. See People v. Norton, 7 Barb. 477.

where there is a clear cause of action, and compensation in damages would be an effectual or appropriate remedy(*e*).

A party applying for a mandamus must make out a legal right and a legal obligation(*f*), and if he show such legal right it is sufficient, although there be also a remedy in equity, for when the court refuses to grant a mandamus because there is another specific remedy, they mean only a specific remedy at law(*g*). A legal obligation, which is the proper foundation for a mandamus, can only arise from common law, from statue, or from contract. An officer in the Queen's army, therefore, has no claim for a mandamus against the Paymaster of the Forces, to compel the payment of pay improperly withheld from him, as the obligation, though binding in equity and conscience, wants the *vinculum juris*, and is not a legal obligation(*h*). But where public officers had actually received a specific sum of money for the use of the prosecutor, and wrote and informed him that he might receive it on application at their office, and then refused to pay it except on conditions which they had no right to impose, the court granted a mandamus, enjoining them to pay the money(*i*). But the mere receipt of a lump sum of money by public officers, to be distributed or administered by them, does not render them liable to a mandamus for not paying the money(*k*).

Where an annuity has been granted by Act of Parliament, and charged upon the consolidated fund, and the annuity is in arrear, and payment can only be obtained by warrant of the Lords of the Treasury,

(*e*) Com. Dig. MANDAMUS, A. Rex *v.* Clear, 4 B. & C. 901. Reg. *v.* Ponsford, 1 D. & L. 116; 12 Law J., Q. B. 313. See State *v.* Zanesville, etc., Co., 16 Ohio St. 308; People *v.* Pacheco, 29 Cal. 210.

(*f*) Reg. *v.* Balby, etc, Turnpike Trust, 23 Law J., Q. B. 164. Reg. *v.* Abrahams, 4 Q. B. 161. Reg. *v.* Orton Trustees, 14 Q. B. 146. Bassett, *Ex parte*, 7 Ell. & Bl. 280. State *v.* Nicholson Pavement Co., 35 N. J. L. 396. Fitch *v.* Diarmid, 26 Ark. 482. People *v* Supervisors of Chenango, 11 N. Y. 563. People *v.* Hawkins, 46 N. Y. 9. Silverthorne *v.* Warren R. R. Co., 33 N. J. L. 372. State *v.* Warren, etc., Co., 3 Vroom (N. J.), 439. State *v.* Jacobus, 2 Dutch. (N. J.) 135. People *v.* Hatch, 33 Ill. 9. Arberry *v.* Bearers, 6 Texas, 457. Draper *v.* Noteware, 7 Cal. 276.

(*g*) Buller, J., Rex *v.* Stafford (Marquis of), 3 T. R. 651. Hardcastle *v.* Maryland, etc., R. R. Co., 32 Md. 32. People *v.* Chicago, 53 Ill. 424. Commonwealth *v.* Commissioners of Alleghany, 32 Penn. St. 218.

(*h*) Napier, *Ex parte*, 18 Q. B. 695; 21 Law J., Q. B. 332. Mandamus will not lie against the secretary of the navy at the instance of an officer of the navy to enforce payment of his pay. Brashear *v.* Mason, 6 How. (U. S.) 92.

(*i*) Rex *v.* Treasury (Lords of), 4 Ad. & E. 286. But see Reg. *v.* Commissioners of Treasury, L. R., 7 Q. B. 387. A county treasurer may be compelled by mandamus to pay to the judgment creditor of his county, funds raised by tax for that purpose, where a statute makes it the duty of the officer to pay such funds to the creditor on demand. Brown *v.* Cregv, 33 Iowa, 468. Or to pay a sheriff his fees when audited and allowed by the proper officer. Baker *v.* Johnson, 41 Me. 15. See People *v.* Edmonds, 19 Barb. 468.

(*k*) Walmsley, *Ex parte*, 1 B. & S. 81.

and the duty of granting the warrant is imposed upon them by statute, and they refuse to fulfil this duty, and to do what is necessary to be done to enable the prosecutor to obtain payment, there is a case for a mandamus(*l*); but if the prosecutor fails in establishing a clear statutory duty, the court will decline to interfere(*m*). And as against the servants of the Crown, as such, and merely to enforce the satisfaction of claims upon the Crown, it is an established rule that a mandamus will not lie(*n*).

1487 *Mandamus to compel the surrender of public documents.*—The court has refused to grant a mandamus to compel a private individual to give up documents of a public nature, where the party claiming the possession of them had a remedy by action for the conversion or detention of the documents(*o*); but the remedy by action is not an effectual remedy for the recovery of the documents themselves; and wherever a private individual, who has quitted office, keeps back public documents of which he obtained custody whilst acting in an official character or capacity, and by color of his office, the court will by mandamus compel the production of the documents, and if private and public documents have been so mixed up together that they cannot be severed, the whole must be produced (*p*). Thus, a mandamus will be granted to a person who has previously served the office of town-clerk in a borough, directing him to deliver up records and books connected with the administration of public justice in the borough, which came into his custody as town-clerk, and to hand them over to his successor

(*l*) Reg. *v.* Treasury (Lords of), 16 Q. B. 361. Reg. *v.* Ambergate, etc., Rail. Co., 17 Q. B. 967. But see Reg. *v.* Commissioners of Treasury, *supra*. Mandamus lies to compel a State auditor to issue his warrant on the treasury for the payment of the salaries of public officers which by statute are payable by the State. Reynolds *v.* Taylor, 43 Ala. 420. Johnson *v.* Reynolds, 44 Ala. 586. McKinney *v.* Reynolds, 44 Ala. 660. State *v.* Gamble, 13 Florida, 9. Swann *v.* Buck, 40 Miss. 268. Shaw *v.* Howell, 18 La. An. 195. Fowler *v* Pierce, 2 Cal. 165. Page *v.* Hardin, 8 B. Mon. 648. Unless some person, other than the relator, holds the commission. Winston *v.* Moseley, 35 Mo. 146. State *v.* Auditor 34 Mo. 375. People *v.* Thompson, 25 Barb. 73. Or to compel him to issue a warrant for money due for property received by the State under contract. People *v.* Secretary of State, 58 Ill. 90. McCauley *v.* Brooks, 16 Cal. 11. And see Lindsey *v.* Auditor, 3 Bush (Ky.), 231.

(*m*) Rex *v.* Treasury (Lords of), 4 Ad. & E. 961. And see R. *v.* Receiver of Metrop. Police, 33 Law J., Q. B. 52. See Reeside *v.* Walker, 11 How. (U. S.) 272; United States *v.* Guthrie, 17 How. (U. S.) 284; United States *v.* Seaman, 17 How. (U. S.) 253; Kendall *v.* Stockton, 13 Pet. 524; Decatur *v.* Paulding, 14 Pet. 497; Brashear *v.* Mason, 6 How. (U. S.) 92; Brown *v.* United States, 6 Ct. of Cl. 171.

(*n*) Bode (Baron de), *In re*, 6 Dowl. P. C. 793. Hand, *In re*, 4 Ad. & E. 964. Smith, *In re*, ib. 976. Ricketts, *Ex parte*, ib. 999. That a claim against the State cannot be enforced by mandamus against the treasurer, see Weston *v.* Dane, 51 Me. 461; Houston, etc., R. R. Co. *v.* Randolph, 24 Tex. 317.

(*o*) Reg. *v.* Hopkins, 1 Q. B. 169.

(*p*) Rex *v.* Payn, 5 Ad. & E. 399. People *v.* Head, 25 Ill. 325. People *v.* Kilduff, 15 Ill. 493; Banton *v.* Wilson, 4 Tex. 400.

in the office(*q*); also to a retired overseer of the poor, to compel him to deliver over the parish books to the new overseer(*r*); also to a dismissed clerk of a chartered company, requiring him to deliver up to the company all books, papers, etc., which he had in his custody by virtue of being their clerk(*s*). But where a vestry clerk moved for a mandamus to certain churchwardens to give up to him the custody of the vestry-book, which had been taken from him at a vestry meeting, the court refused the application, as the vestry clerk had no certain tenure of office, and was the mere servant of the vestry, and could be dismissed, and the book taken away from him at their will(*t*).

1488 *A mandamus to restore a public officer to a freehold office from which he has been wrongfully dismissed*, may be obtained on due proof of the wrongful dismissal(*u*). A public officer appointed for life, or during good behavior, cannot lawfully be removed from his office for misconduct without being called upon to make, and being afforded an opportunity of making, his defence, for "Nullus liber homo disseisietur de libero tenemento suo nisi per legale judicium parium suorum vel per legem terræ"(*x*). If he has committed felony, or a misdemeanor, he must be tried and convicted by a jury before the offence can work a forfeiture of his office, and if he has been guilty of misconduct in the discharge of his official duties, he must have an opportunity given him of answering the charge, or have been heard in his own defence before he can lawfully be removed. Where a vicar removed a parish clerk for acts of misconduct alleged to have been committed in the vicar's own view, the court granted a mandamus to compel the vicar

(*q*) Nottingham Town Clerk's case, 1 Sid. 31. Rex *v.* Ingram, 1 W. Bl. 49. Sudbury *v.* Stearns, 21 Pick. 148. Taylor *v.* Henry, 2 Pick. 397. Or to compel a register to comply with the statute requiring him at the close of his duties to deposit the original books with the county clerk. McDiarmid *v.* Fitch, 27 Ark. 106. To compel a judge of probate to deliver the books, papers, etc., belonging to his office to his successor. Crowell v. Lambert, 10 Minn. 369. To compel the delivery of official books and papers to the selectmen by persons who are alleged to have usurped the office. Kimball *v.* Lamprey, 19 N. H. 215. And to compel the treasurer or clerk of a religious society, whose term of office has expired, to deliver the records and papers of the society to his successor in office St. Luke's Church *v.* Slack, 7 Cush. 226.

But under the Kansas Civil Code (ss. 688, 689), a mandamus will not issue to recover the records of an office from an individual not claiming them by virtue of office. Hussey v. Hamilton, 5 Kans. 462.

A committee appointed by a town to audit the books of a town officer have not such a property in the books as will authorize them to apply in their own names for a mandamus to compel the surrender of such books. Bates *v.* Plymouth, 14 Gray (Mass.), 103.

(*r*) Rex *v.* Clapham, 1 Wils. 305. Reg. *v.* Fox, W. W. & H. 4.

(*s*) Rex *v.* Wildman, 2 Str. 879.

(*t*) Anon., 2 Chitt. 255. Rex *v.* Croydon, 5 T. R. 714.

(*u*) Rex *v.* Morpeth Ballivos, 1 Str. 52.

(*x*) MAGNA CHARTA, c. 29.

to restore the clerk to his office. For the vicar it was contended, that as he acted on his own view of the prosecutor's misconduct, any kind of process for enabling him to disprove or explain it must be superfluous, and that the law invested the vicar with the functions of accuser, witness, and judge, in respect of indecent conduct publicly exhibited in his presence; but the court held that sentence of removal from a freehold office ought to be preceded by some mode of inquiry, in which the accused should have an opportunity of being heard, and of explaining his behavior. "The important principle that every man ought to be heard before he is condemned, so strenuously asserted by Lord Kenyon(*y*), is not excluded," observe the court, "because the charge rests on the minister's personal observation, inasmuch as that is not inconsistent with the disproof of criminal motives and intentions, with the mitigation to which other facts might possibly entitle the accused, or with condonation of the offence. This principle appears to us valuable to the judge, whom it tends to secure against yielding too hastily to his own first impressions, while we think it indispensable, for the sake of the party charged, in all cases, to the due execution of every judicial power"(*z*).

Even although the officer, having been duly elected, has procured himself to be admitted to the office by means of fraudulent misrepresentation and deceit, he must be called upon to come in and defend himself before he can lawfully be removed(*a*). Where, however, the election itself was void *ab initio*, on the ground of fraud, so that the party has never become a member, his admission may, it seems, be cancelled without a hearing(*b*).

There seems to be a great deal of difference between a mandamus to admit, and a mandamus to restore, to a freehold office. The former is granted merely to enable the party to try his right, without which he would be left without any legal remedy. But the court have always looked much more strictly to the right of the party applying for a mandamus to be restored. In these cases he must show a *prima facie* title; for if he has been before regularly admitted, he may try his right by bringing an action for money had and received for the profits. Therefore, in order to entitle himself to this extraordinary

(*y*) In Rex v. Gaskin, 8 T. R. 209. And see per Ld. Ellenborough, C.J., in Buchanan v. Rucker, 1 Campb. 65.

(*z*) Reg. v. Smith, 5 Q. B. 623; 14 Law J., Q. B. 166. Doe v. Gartham, 1 Bing. 357. Cooper v. Wandsworth Board, etc., 32 Law J., C. P. 186.

(*a*) Reg. v. Sadlers' Co., 30 Law J., Q. B. 186; 32 ib. 337; 10 H. L. C. 404.

(*b*) Reg. v. Sadlers' Co., *ut sup.* Reg. v. Gen. Council Med., etc., 30 Law J., Q. B. 202.

remedy, he must lay such facts before the court as will warrant them in presuming that the right is in him(*c*).

1489 *How a freehold office may be forfeited and vacated.*—If a man grant an office to another for term of his life, the freehold estate which the grantee hath in the office is upon condition in law that he shall well and faithfully do that which to such office belongeth to do, or otherwise it shall be lawful to the grantor and his heirs to oust him, and grant the office to another(*d*). There are, says Lord Coke, three causes of forfeiture, or seizure of offices: 1, by abuser; 2, non-user; 3, refusal(*e*). If the officer is removed by reason of the forfeiture of his freehold office, through breach of the implied trust upon which it was granted, that will be a removal "per legem terræ." If he is not so removed, he ought to be convicted, "per judicium parium suorum," of some public crime before he can lawfully be dispossessed of his freehold(*f*). And the crime must be of such a nature as to render the officer publicly infamous, and unfit to hold any public office; for if he has been convicted of an assault, or any other offence which does not carry such infamy with it, the conviction will be no ground of disfranchisement(*g*).

"There are," observes Lord Mansfield, "three sorts of offences for which an officer or corporator may be discharged: first, such as have no immediate relation to his office, but are in themselves of so infamous a nature as to render the offender unfit to execute any public franchise; secondly, such as are only against his oath and the duty of his office as a corporator, and amount to breaches of the tacit condition annexed to his franchise or office; thirdly, such as are of a mixed nature, as being an offence not only against the duty of his office, but also a matter indictable at common law. For the first sort of offences there must be an indictment and conviction before removal; but in respect of the second class of offences the party must be tried by the corporation"(*h*). And there cannot, it seems, be any cause to disfranchise a member of a corporation, unless it be for a thing done which tends to the destruction of the body corporate or to the destruction of

(*c*) Rex v. Jotham, 3 T. R. 575.

(*d*) Litt. sect. 378. The grantee may be ousted "s'il non attend sur son office, s'il fait contrariant chose à son office, ou misfeasance de son office," 11 Edw. 4, fol. 1. As to the duties annexed to the freehold office of clerk of the peace, see Harding v. Pollock, 6 Bing. 50.

(*e*) Earl of Shrewsbury's case, 9 Rep. 46 b. See Wildes v. Russell, L. R., 1 C. P. 722.

(*f*) Bagg's case, 11 Co. 99. Harcourt v. Fox, 1 Show. 431, 506; 4 Mod. 169.

(*g*) Rex v. Richardson, 1 Burr. 538; Buller's N. P. 7th ed. 206. Reg. v. Clerk of the Peace of Cumberland, 11 Mod. 81; 1 Roll. Abr., OFFICE, 155. Cruise's Digest, FRANCHISE.

(*h*) Rex v. Richardson, 1 Burr. 537. Rex v. Mayor of Liverpool, 2 Burr. 733. Reg. v. Baines, 6 Mod. 192; 2 Salk. 680.

the liberties and privileges thereof. Any mere personal offence of one member thereof affords no cause for disfranchisement(*i*). Mere misapplication of the money of the corporation is not a good ground for the disfranchisement of a corporator; the corporation must have an action for the money(*j*).

1490 *Offices held at will*, or during the good pleasure, or at the discretion, of the parties appointing to them, may be taken away without any reason assigned, or any summons or hearing of the party removed(*k*). This is the case with the office of a vestry-clerk (*ante*, p. 1267), clerk to justices(*l*), clerks and treasurers of guardians of the poor(*m*), and the minister of a dissenting congregation, who is elected by the majority of the members of the congregation, and who may be removed by such majority, and be turned out of his house, premises, and chapel, if they are dissatisfied with his doctrines and religious teaching(*n*), or restrained by injunction from further officiating(*o*).

Where the charter by which a charity was founded conferred on the governors full power to appoint the schoolmaster, and to remove him and appoint another according to their sound discretion, and a schoolmaster was appointed and afterwards dismissed, it was held that the court could not interfere with the discretion of the governors, or review their reasons for the dismissal(*p*).

1491 *Visitatorial power excluding the proceeding by mandamus.*—Where corporate offices are held in private or eleemosynary corporations, on the terms that, if any dispute should arise respecting the right to the office, or the validity of a discharge, or a motion from it, such dispute should be settled or determined by a visitor or judge whom the founder has nominated, the court will not interfere by mandamus(*q*). But one branch of a corporation has no visitatorial power over another. The visitatorial power emanates from the founder. In royal foundations of a private or eleemosynary character, if no special visitor has been appointed, the king exercises the power by his chan-

(*i*) Earle's case, Carth. 176.

(*j*) Rex *v.* Chalke, 1 Ld. Raym. 225. Rex *v.* Wilton (Mayor, etc.), 5 Mod. 257.

(*k*) Rex *v.* Stratford (Mayor, etc.), 1 Lev. 291.

(*l*) Sandys, *Ex parte*, 4 B. & Ad. 863.

(*m*) Rex *v.* St. Nicholas, etc., 4 M. & S. 324.

(*n*) Doe *v.* Jones, 10 B. & C. 718. Doe *v.* McKaeg, ib. 721. Mandamus will lie to put a minister in possession of his pulpit. People *v.* Steele, 2 Barb. 397. Runkle *v.* Winemiller, 4 Har. & McHen. 429.

(*o*) Cooper *v.* Gordon, L. R., 8 Eq. Ca. 249; 38 L. J., Ch. 489.

(*p*) Reg. *v.* Darlington School Governors, 6 Q. B. 696, 715. Mandamus will lie to reinstate a teacher discharged by the committee against the wish of the district. Gilman *v.* Bassett, 33 Conn. 298.

(*q*) Reg. *v.* Dean and Chap. of Chester, 15 Q. B. 513. Reg. *v.* Dean and Chap. of Rochester, 17 ib. 1.

cellor. In corporations established for the government of cities and towns, the king may be said to exercise the power by mandamus through the Court of Queen's Bench(*r*).

1492 *Mandamus to restore the name of a medical practitioner to the Medical Register.*—By 21 & 22 Vict. c. 90, s. 29, it is enacted, that if any medical practitioner shall be convicted of any felony or misdemeanor, or shall, after due inquiry, be judged by the general council of medical education and registration(*s*) to have been guilty of infamous conduct in any professional respect, the general council may, if they see fit, direct the registrar to erase the name of such medical practitioner from the register. The decisions of the council under this section, made after due inquiry, are final, and cannot be reviewed by the superior court. Where, therefore, the medical council, after communicating to a medical practitioner certain charges made against him of infamous conduct in his profession, and having heard and considered his answers and explanations, directed the registrar to remove his name from the medical register, the court refused a mandamus to restore him(*t*).

1493 *Mandamus to test the validity of an election.*—The mere rejection of votes at an election of corporate officers furnishes no ground for interference by mandamus, where it does not appear that the election has been thereby vitiated. It must be shown that the rejection of the votes led to the declaration of a candidate as duly elected who would have failed if the votes had been received(*u*). The validity of an election by parishioners of churchwardens may, under certain circumstances, be tried by mandamus(*x*). And where it is the custom for the parishioners to elect one churchwarden and for the rector to nominate the other, the validity of the rector's nomination may be tested by mandamus(*y*).

1494 *Mandamus to elect corporate and public officers.*—A mandamus lies also to the inhabitants of a parish, directing them to meet together and elect churchwardens(*z*), but not to churchwardens, to call a vestry to

(*r*) Rex *v.* London (Mayor of), 4 M. & R. 62.

(*s*) See 25 & 26 Vict. c. 91; 31 & 32 Vict. c. 29.

(*t*) La Mert, *Ex parte*, 33 Law J., Q. B. 69. Barrows *v.* Massachusetts Medical Society, 12 Cush. (Mass.) 402.

As to the right of a medical practitioner to compel a medical society, by a writ of mandamus, to admit him to membership, see People *v.* Medical Society, 32 N. Y. 187; Paine, *Ex parte*, 1 Hill, 665.

(*u*) Mawby, *Ex parte*, 3 Ell. & Bl. 718.

(*x*) Rex *v.* Birmingham (Rector of), 7 Ad. & E. 254.

(*y*) Barlow, *In re*, 39 Law J., Q. B. 271.

(*z*) Rex *v.* Wix, 2 B. & Ad. 197.

elect a sexton, where the office is full by the appointment of the rector, and there is a remedy by refusing the sexton his fees, or bringing an action if they are taken(*a*); or to elect an organist(*b*).

1495 *Mandamus to enforce an appointment to a public or corporate office.*—It is the duty, also, of the Court of Queen's Bench to see that the functions appertaining to public offices are discharged by persons duly elected to the office. When, therefore, a public office is vacant, and a party has been elected to serve the office, the court will by mandamus enforce the right to the office; but where the office has been created by charter, or by statute, and is not vacant, but has been usurped by an intruder, and the right to the office is disputed between two rival claimants, the right must in general be tried by *quo warranto*, and not by mandamus(*c*). If, however, there is only a colorable election, it is void, and a mandamus to hold an election will be granted(*d*). And there are occasions where a *quo warranto* will lie, and yet the remedy by mandamus may be deemed a more appropriate remedy(*e*).

Wherever a person has been properly appointed to a corporate office, having a salary annexed to it, or has been duly elected to serve the office, and the corporation refuses to institute him in the office, a mandamus lies to compel them to do so(*f*); but the court will not interfere where it will have to unravel the rights of voters who are alleged to have been themselves unduly elected, and to have had no right to vote(*g*).

The writ of mandamus lies also against a rector or a parson, to compel him to receive and swear in a person who has been duly appointed to the office of churchwarden, sexton, parish-clerk, etc.(*h*); to a dean and chapter, to admit a prebendary to his stall and voice(*i*); to the

(*a*) Rex v. Stoke Damerel, 5 Ad. & E. 584.

(*b*) Reg. v. St. Stephens, etc., 14 Law J., Q. B. 34.

(*c*) Rex v. Colchester (Mayor of), 2 T. R. 259. Reg. v. St. Martins, etc., 20 Law J., Q. B. 423. Darley v. The Queen, 12 Cl. & Fin. 520. Hill v. Reg., 8 Moore, P. C. C. 189. Rex v. Winchester (Mayor of), 7 Ad. & E. 222. Reg. v. Derby, Ib. 419. State v. McCullough, 3 Nev. 202. State v. Auditor, 36 Mo. 70 People v. Head, 25 Ill. 325. People v. Scrugham, 20 Barb. 302. People v. Stevens, 5 Hill, 516. Bonner v. State, 7 Ga. 473. Louis County Court v. Sparks, 10 Mo. 117. People v. Detroit, 18 Mich. 338. People v. Corporation of N. Y., 3 Johns Cas. 79. Underwood v. White, 27 Ark. 382.

(*d*) Rex v. Cambridge, 4 Burr. 2010. Reg. v. Oxford (Mayor of), 6 Ad. & E. 353. Reg. v. Leeds (Mayor of), 11 Ad. & E. 517.

(*e*) Lawrence J., Rex v. Bedford Level, 6 East. 367. Harwood v. Marshall, 9 Md. 83. And see Lindsey v. Luckett, 20 Texas, 516; Felts v. Memphis, 2 Head (Tenn.), 650; Singleton v. Commissioners, 2 Bay, 105; Den v. Judges, 3 H. & M. 1; Street v. Gallatin County Commissioners, Breese, 25. Mandamus lies to compel a police board to restore a policeman illegally removed. People v. Board of Police, 26 Barb. 487.

(*f*) Rex v. Cambridge University, 1 W. Bl. 551. Rex v. Windham, 1 Cowp. 377.

(*g*) Reg. v. Dolgelley Guardians, etc., 8 Ad. & E. 564.

(*h*) Barlow, *In re*, 30 Law J., Q. B. 271; March, 101.

(*i*) Rex v. Dean, etc., of Norwich, 1 Str. 159. Clarke v. Bishop of Sarum, 2 Ib. 1068.

lord of a manor, to admit a copyholder to a copyhold estate(*k*), or to permit him to inspect the court-rolls of the manor(*l*); to the trustees of a meeting-house, to compel them to admit to the pulpit thereof a dissenting minister duly elected(*m*). But a mandamus does not lie to compel the admission of a person to any mere private appointment, situation, or employment(*n*), such as that of clerk or secretary to a joint-stock company(*o*), vestry-clerk or toll-gate keeper(*p*), nor to restore to an office a person who is admitted to have been rightly removed(*q*), or who is removable at will(*r*).

The writ of mandamus will not lie to compel the institution of a clergyman to a presentative benefice, as the appropriate remedy by *quare impedit* is open to those who present him, and he has himself no legal right whatever(*s*).

1496 *Mandamus to chartered companies and corporations.*—The writ of mandamus lies also against all chartered companies and corporations, to compel them to conform to the provisions of their charter or act of incorporation, and to discharge the functions vested in them. Whenever a company, incorporated by royal charter or by Act of Parliament, has imposed upon it the duty of keeping a register, and inserting therein the names of the shareholders, the court will by mandamus compel the performance of the duty(*t*). The writ lies also against the directors of a chartered company, enjoining them to admit, or to swear in as a director of the company, a person who has been duly elected to the office(*u*); or to admit the prosecutor of the writ a member of the company(*x*). It is available, also, against the steward of a

(*k*) Rex *v.* Hendon (Lord of the Manor, etc.), 2 T. R. 484. See Reg. *v.* Garland, L. R., 5 Q. B. 269.

(*l*) Rex *v.* Tower, 4 M. & S. 162.

(*m*) Rex *v.* Barker, 3 Burr. 1265. Rex. *v.* Jotham, 3 T. R. 577. People *v.* Steele, 2 Barb. 397. But see Union Church *v.* Sanders, 1 Houston (Del.), 100.

(*n*) Ile's case, 1 Ventr. 143.

(*o*) White's case, 6 Mod. 18.

(*p*) Rex *v.* Croydon Churchwardens, etc., 5 T. R. 713.

(*q*) Rex *v.* Mayor, etc., of Axbridge, 2 Cowp, 523.

(*r*) Le Roy *v.* Campion, 1 Sid. 14.

(*s*) Reg. *v.* Orton (Trustees of), 14 Q. B. 146.

(*t*) Norris *v.* Irish Land Co., 8 Ell. & Bl. 525. Swan *v.* North Brit. Austral. Co., 31 Law J. Exch. 425.

(*u*) Anon., 2 Str. 696.

(*x*) Dacosta *v.* The Russia Co., 2 Str. 783. Rex *v.* March, 2 Burr. 1000. Reg. *v.* Sadlers' Co., Bail. Court. Cas. 183. Where a member of a voluntary society, incorporated, has by the act of the society been deprived of a substantial right in violation of the constitution of the society, he may compel a restoration of the right by mandamus. Roehlen *v.* Aid Society, 22 Mich. 86. The writ will also lie against the board of directors of a chamber of commerce to restrain them from depriving a member of his franchise. State *v.* Chamber of Commerce, 20 Wis. 63.

The remedy against the usurpation and unlawful holding of the office of trustee of a legally

corporation, for the purpose of compelling him to produce the public books at corporate meetings(*y*); also, against the master of a hospital incorporated for charitable purposes, for the purpose of compelling him to put the common seal of the corporation to an instrument of presentation(*z*); against the warden of a college, to compel him to affix the common seal of the college to an answer of the sub-warder, bursars, dean, and principal officers of the college, to a bill in Chancery(*a*).

The court will by mandamus entertain the question whether a corporation, not having affixed its seal, is bound to do so; but not the question whether, when they have affixed it, they were right in so doing. The writ is granted when that has not been done which a statute orders to be done, but not for the purpose of undoing what has been done(*b*).

The writ is available, also, for the purpose of enforcing performance of the duties imposed by charter, custom or contract, on the body corporate in favor of particular members thereof. Where there is a dispute and matter of controversy between the corporation on the one hand, and one of its members on the other, respecting the corporate rights and privileges of the latter, a mandamus may be obtained at his instance against the corporation, commanding them to allow him to inspect the corporate records, by-laws, minute-books, and other documents relating to the matter in controversy, to see whether he can make out a case in his favor, and initiate proceedings against the corporation with a prospect of success(*c*). But the court will not grant a mandamus for a general inspection of all records, muniments, etc.,

incorporated church is by mandamus. Clayton *v.* Carey, 4 Md. 26. In certain cases railroad companies may be compelled by mandamus to complete their roads. State *v.* Southern Minnesota R. R. Co., 18 Minn. 40. And to continue to operate them. State *v.* Hartford, etc., R. R. Co., 29 Conn. 538. To deliver to a certain elevator whatever grain in bulk may be consigned to it upon the line of its road. Chicago, etc., R. R. Co. *v.* People, 56 Ill. 365. To pay a tax on its capital stock. Person *v.* Warren R. R. Co., 3 Vroom (N. J.), 441. To so construct, level and grade the embankments, side-tracks and switches, and street and alley crossings, as to render the use of the streets and alleys and crossings of the track easy and convenient to the public. Indianapolis, etc., R. R. Co. *v.* State, 37 Ind. 489.

So mandamus lies to compel a canal company to bridge over a private way which it intersects. Habersham *v.* Savannah, etc., Canal Co., 26 Ga. 665. To compel a railroad company to pursue the mode prescribed in their charter in crossing rivers and watercourses, and to prevent them from obstructing navigation. State *v.* Northeastern R. R. Co., 9 Rich. Law (S. C.), 247. As to the replacement of stock sold out and transferred on the authority of a forged signature, see Mid. Rail. Co. *v.* Taylor, 31 Law J., Ch. 336.

(*y*) Borough of Calne's case, 2 Str. 948

(*z*) Reg. *v.* Kendal, 1 Q. B. 366. But see Reg. *v.* Orton Trustees, 14 Q. B. 146.

(*a*) Rex *v.* Windham, 1 Cowp. 377.

(*b*) Nash, *Ex parte*, 15 Q. B. 95; 19 Law J., Q. B. 296.

(*c*) Burton, *In re*, 31 Law J., Q. B. 62. See People *v.* Walker, 9 Mich. 328; People *v.* Throop, 12 Wend. 183.

but only of such as relate to the particular matter in controversy; for the members of a corporation have no right, on speculative grounds, to call for an examination of the books and muniments, to see if they can fish out of them some complaint or charge against the corporate body. It is necessary that there should be some particular matter in dispute between the members, or between the corporation and individuals in it, in which the applicant is interested, and in respect of which the examination becomes necessary(*d*).

The writ goes also to a corporation or chartered company, to compel it to fulfil the duties it has contracted towards strangers, where there is no other suitable or effectual remedy. A judgment creditor, therefore, of a trading corporation may obtain a mandamus enjoining the corporation to give him inspection of the register of shareholders, if he has no other or effectual means of obtaining such inspection(*e*).

There is no practical distinction in this respect between companies existing by statute and companies created by charter. A mandamus, therefore, lies against a company incorporated by statute, commanding them by the hand of their secretary to enter on their books, or to register, the probate of the will of a deceased shareholder(*f*); also transfers, or memorials of transfers, of shares(*g*).

But if the prosecutor of the writ of mandamus is not proceeding *bonâ fide* for the purpose of enforcing his rights as a shareholder, and has no interest himself as one of the public in the performance of the thing which he seeks to have done, he is not entitled to the writ(*h*). Nor will the court grant the writ at the instance of one of several partners in a trading corporation, who seeks merely to compel the directors to produce their accounts and divide profits, the Court of Chancery being the proper tribunal for that purpose(*i*).

1497 *Mandamus to make calls.*—Where a public board or corporate body is clothed with certain defined statutory powers, and is authorized to enter into contracts, and has the power of creating, by calls on shareholders, a future corporate property, from time to time, out of the pri-

(*d*) Rex *v.* Merchant Taylors' Co., 2 B. & Ad. 115. Rex *v.* Hostmen of Newcastle, 2 Str. 1223.

(*e*) Reg. *v.* Derbyshire, etc. Rail. Co., 3 Ell. & Bl. 784.

(*f*) Rex *v.* Worcester Canal Co., 1 M. & Ry. 529.

(*g*) Reg. *v.* Lond. & Coleraine Rail. Co., 13 Q. B. 998. Reg. *v.* Wing, 17 ib. 645. Reg. *v.* Gen. Cem. Co., 6 Ell. & Bl. 415. Norris *v.* Ir. Land. Co., 8 Ell. &. Bl. 512. Reg. *v.* Mid., etc., Rail. Co., 15 Ir. C. L. Rep. 525. State *v.* McIver, 2 S. C. 25. But see Firemen's Insurance Co., *Ex parte*, 6 Hill, 243.

(*h*) Reg. *v.* Liverpool, Manchester, etc., Rail. Co., 21 Law J., Q. B. 284. Briggs, *Ex parte*, 28 Law J., Q. B. 272. See People *v.* Collins, 19 Wend. 56. Cannon *v.* Janvier, 3 Houston (Del.), 27. People *v.* Regents of the University, 4 Mich. 98.

(*i*) Rex *v.* Bank of England, 2 B. & Ald. 620.

vate assets of its individual members, and contracts are made with the corporation on the faith that an honest exercise will be made of these powers, and it is clearly established that the corporation is evading the payment of its just debts, and the due satisfaction of a judgment recovered against them, on the ground that they have no corporate assets in hand wherewith to pay, the court will, by mandamus, compel them to exercise the powers vested in them for raising funds, and answer the demands of their creditors(*j*). But where an action has been brought against a corporation for a debt claimed to be due, and judgment has been recovered, and the plaintiff has the ordinary legal remedy of an execution, the court will not issue a mandamus merely because the execution may produce no fruits(*k*).

1498 *Mandamus to local boards, commissioners, trustees, and public officers to levy rates and satisfy and discharge a judgment-debt, or a pecuniary obligation.*—Whenever judgment has been recovered in an action against the clerk of the local board, or of commissioners or trustees, in respect of something done by such commissioners or trustees in the execution of statutory powers, exempting them from personal liability, the judgment-creditor, when he fails to obtain satisfaction of his judgment-debt from the corporate estate and effects of the board, is, in general, entitled to a mandamus to compel the board or other public body to levy a rate, and discharge the judgment-debt. Wherever public officers have borrowed money upon the security of rates they are authorized to impose, and have not themselves contracted any personal liability to pay, a mandamus will go to compel them to make a rate and repay the money(*l*). If an Act of Parliament authorizes parish

(*j*) Rex v. St. Cath. Dock Co., 4 B. & Ad. 360. See Commonwealth v. Perkins, 43 Penn. St. 400. State v. Canal, etc., R. R. Co., 26 La. An. 333.

(*k*) Reg. v. Victoria Park Co., 1 Q. B. 298.

(*l*) Reg. v. Brancaster Churchwardens, 7 Ad. & E. 456. A United States District Court has power in a proper case to issue a mandamus to compel state or municipal officers to proceed to levy and collect a tax. Lansing v. County Treasurer, 1 Dill. 522. United States v. Macoupin county, 2 Abb. (U. S.) 53.

The directors of a school district township may be compelled by mandamus for the payment of a judgment against it where the electors have refused to vote the necessary tax. Boynton v. Newton, 34 Iowa, 516.

So where the trustees of a village are required by statute to raise and collect by tax such sums as the board of education shall deem necessary for the maintenance of the public schools in the village, they may be compelled by mandamus to raise by tax the amount demanded by the board. People v. Bennett, 54 Barb. 480.

So where the county officers have no funds which they can apply to pay off an unquestioned indebtedness, but are authorized to raise the sum by tax, a mandamus will issue to compel a levy of the tax. Pegram v. Cleaveland County, 64 N. C. 557.

Where commissioners have been appointed by the legislature without the consent of the people, to prosecute a public work, and the people to be taxed for the improvement have by vote ratified the law and made such commissioners corporate authorities, and empowered

officers, commissioners of public works, or boards of health, to enter into contracts for public works, to employ subordinate salaried officers, and to charge the costs and expenses they incur upon rates they are authorized to impose, and contracts are made by them and officers appointed, and expenses incurred, and there is no personal liability to pay, and the ordinary remedy by way of action is not available, the court will, by mandamus, compel them to make a rate, and provide themselves with funds and pay such expenses(*m*).

Under s. 89 of the Local Board of Health Act, 11 & 12 Vict. c. 63, a local board of health may be compelled by mandamus to make a rate for the purpose of satisfying a judgment within six months after the judgment has been obtained against them(*n*). And the remedy is not, generally speaking, available after the six months have expired(*o*). But a rate may be ordered in aid of a judgment within six months after the judgment is obtained, although the action on which the judgment was obtained was commenced more than six months after the claim accrued, if the delay is excused and shown not to have been undue(*p*).

1499 *Mandamus to railway companies, corporate bodies, and local boards to make compensation for lands taken, or injuries inflicted upon private persons.*—Whenever any public body, executing public works under statutory powers, is required by Act of Parliament to make compensation to all persons who may sustain injury from the exercise of the powers

them to issue the requisite tax, the levy of the tax may be enforced by mandamus. People v. Salomon, 51 Ill. 37. People v. Williams, id. 37, 63.

A mandamus and not a bill in equity is the proper remedy to compel the levy of a tax by a municipal corporation to pay off a judgment against it. Walkley v. Muscatine, 6 Wall. (U. S.) 481.

And where a city charter provides that "the city council may annually collect a tax not exceeding one per cent. on a dollar on the value of all taxable estate in said city, if the said city council believe that the public good and the best interests of the city require it," a mandamus will lie to compel the city to levy a tax to pay its funded debts. Galena v. Amy, 5 Wall. (U. S.) 705.

And generally a mandamus will issue to compel a common council of a city to levy a tax to pay a judgment against the city unless it appears that they have no such power. State v. Milwaukee, 20 Wis. 37. Coy v. Lyons City, 17 Iowa, 1. Soutter v. Madison, 15 Wis. 30. State v. Davenport, 12 Iowa, 335. See Carroll v. Board of Police, 28 Miss. 38.

So where county commissioners have statutory authority to issue bonds and are required to levy a tax to pay the interest coupons as they become due, they may be compelled by mandamus to levy the tax to pay the interest. Knox County v. Aspinwall, 24 How. 376. Commonwealth v. Pittsburg, 34 Penn. St. 496. Maddox v. Graham, 2 Met. (Ky.) 56.

(*m*) Reg. v. Hurstbourne Tarrant, etc., 27 Law J., M. C. 214; Ell. Bl. & Ell. 246. Reg. v. Norfolk Commissioners of Sewers, 20 Law J., Q. B. 121. Bogg v. Pearse, 10 C. B. 542; 20 Law J., C. P. 99.

(*n*) Reg. v. Rotherham, 8 Ell. & Bl. 906; 27 Law J., Q. B. 156.

(*o*) Burland v. Kingston-upon-Hull Local Board, 32 Law J., Q. B. 17. In other cases, the plaintiff is not concluded by delay. Ward v. Lowndes, 17 C. B. 940. Reg. v. Churchwardens, etc., 27 Law J., M. C. 215. See Bush v. Martin, 2 H. & C. 311; and *post*, p. 1279.

(*p*) Worthington v. Hulton, L. R., 1 Q. B. 63. See Ringland v. Lowndes, 33 Law J., C. P. 25.

intrusted to it, and machinery is provided for ascertaining and determining the amount by arbitration, and the board refuses to make compensation, or denies its liability, the court will, by mandamus, compel it to make compensation, and put the necessary machinery in motion for ascertaining and settling the amount(*q*); and it is no bar to the prosecutor's right to a mandamus that he has not claimed a specific sum, or taken steps to have the amount ascertained and settled pursuant to the Act(*r*). So a mandamus will lie to compel a railway company to restore a highway which they have diverted without statutable authority for so doing(*s*).

A mandamus will go also against railway companies who have given notice to a landowner under the compulsory powers intrusted to them that they require to purchase his land, and are willing to treat, etc., to compel them to summon a jury and take the necessary steps for settling the amount of purchase-money and compensation(*t*). But commissioners acting on behalf of the public, and giving notice that lands are wanted for public purposes, may revoke the notice before it has been acted upon, and cannot be compelled by mandamus to take and pay for the land(*u*).

A mandamus will go to an arbitrator, commanding him to give compensation in respect of lands being injuriously affected by the formation of a railway, or the construction of public works, executed under statutory authority(*x*); and if, after a railway has been made, and compensation given, fresh damage has been sustained from the execution of the railway works, the question whether the railway company is bound to make compensation in respect of this subsequent damage may be determined on a claim for a mandamus(*y*).

1500 *Mandamus to boards of health to make compensation.*—Where a mandamus was issued to a local board of health, enjoining them to make compensation to the prosecutor for damage sustained by him by reason of the exercise by the board of certain powers conferred upon them by the Public Health Act, and the defendants returned that they had not denied their liability to make compensation, but were ready to

(*q*) Rex *v.* Nottingham Old Water Works Co., 6 Ad. & E. 370. See State *v.* Keokuk, 9 Iowa, 438; People *v.* Curyea, 16 Ill. 547; Jennings, *Ex parte*, 6 Cow. 518.

(*r*) Reg. *v.* Burslem Local Board, etc., 29 Law J., Q. B. 242; 28 Ib. 345.

(*s*) Reg. *v.* High Wycombe Rail. Co., L. R., 2 Q. B., 310, decided under s. 16 of the Railway Clauses Act, 8 & 9 Vict. c. 20.

(*t*) Reg. *v.* Birm., etc., Rail. Co., 15 Q. B. 647. South Yorkshire, etc., *In re*, 14 Jur. 1093; see *post*, p. 1290, Morgan *v.* Metrop. Rail. Co.

(*u*) Reg. *v.* Com. of Woods and Forests, 15 Q. B. 774.

(*x*) Reg. *v.* Rynd, 9 L. T. R., N. S. 27.

(*y*) Reg. *v.* Aire & Calder Nav. Co., Rex *v.* Leeds & Selby Rail. Co., *cases*, p. 906.

make it so soon as it had been duly ascertained, but that the prosecutor had taken no steps to have it ascertained, nor given the defendants notice of his claim, or of the cause or amount thereof, and had not appointed an arbitrator, or given notice of his intention to do so, pursuant to the statute, and the return was traversed generally, and on the trial it was found that the defendants had denied all liability, it was held that the prosecutor was entitled to a verdict on the whole return, and to a peremptory mandamus. "It is said," observes Williams, J., "that, looking at the provisions of the Public Health Act, 1848(*z*), and construing them by analogy to those of the Lands Clauses Consolidation Act, the proper course would have been for the applicant himself to have taken steps pursuant to s. 144, and to have got the amount of the compensation fixed by means of the course there prescribed, and then to have brought his action to recover the amount, in which action the question of liability might have been decided; but that involves the necessity, in all cases where there is a doubt whether the party be entitled to compensation, of an expensive inquiry in the first instance, which in the result may prove entirely futile, and we think the question of liability should be first settled by mandamus. Secondly, it is said, that the applicant ought to have claimed a particular amount. We are of opinion that there is no necessity for taking such a step. It would not regulate the frame of the mandamus, or the future rights of the parties"(*a*).

1501 *Effects of lâches or delay in applying for the writ.*—A party who is entitled to a mandamus to a public board, to compel the making of a rate for the payment of a debt, should apply to the court within a reasonable time after default made. And if there is a *primâ facie* case of *lâches* or delay, the onus is thrown upon the applicant of showing that he has not been guilty of such negligence as disentitles him to his remedy(*b*).

The application for a mandamus to a court of quarter-sessions, to compel the hearing of an appeal, must be made in the term next after the hearing of the appeal has been refused, unless special circumstances appear by affidavit to account for the delay to the satisfaction of the court(*c*).

1502 *The proceedings upon a mandamus* were first given by the 9 Anne,

(*z*) 11 & 12 Vict. c. 63, s. 144.

(*a*) Reg. *v.* Bursiem, etc., *ante*, p. 1278.

(*b*) Reg. *v.* Hurstbourne Tarrant, 27 Law J., M. C. 214. Reg. *v.* Halifax Road Trustees, 12 Q. B. 448. See Worthington *v.* Hulton, Ringland *v.* Lowndes, *ante*, p. 1278; and ib. n. (*c*). A delay of four years in applying for the writ has been held fatal. True *v.* Melvin, 43 N. H. 503.

(*c*) Reg. *v.* Richmond (Recorder of), Ell. Bl. & Ell. 255.

c. 20, and are the creature of that Act, but they have been further extended by later statutes(*d*). The first step to be taken by a party desirious of obtaining a mandamus, is to move the Court of Queen's Bench for a rule to show cause why the writ should not issue, or for a rule absolute in the first instance(*e*). By the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, s. 76, it is enacted, that upon application by motion for any writ in the Court of Queen's Bench, the rule may be absolute in the first instance, if the court shall think fit; and the writ may bear teste on the day of its issuing, and may be made returnable forthwith, whether in term or in vacation; but time may be allowed to return it by the court, or a judge, with or without terms. It is further enacted, s. 75, that no writ of mandamus issued out of the court of Queen's Bench shall be invalid by reason of the right of the prosecutor to proceed by action for mandamus under that statute; also (s. 77), that the provisions of the Common Law Procedure Acts, 1852 and 1854, shall, so far as they are applicable, apply to the pleadings and proceedings upon a prerogative writ of mandamus.

1503 *Proceedings by mandamus in respect of corporate offices in boroughs* have been expedited by 6 & 7 Vict. c. 89, s. 5, which enacts, that in all cases of intended application for a mandamus, to proceed to an election of corporate officers, or for a *quo warranto* against any person claiming to be a corporate officer, the party intending to make the application may give notice in writing, and deliver a copy of the affidavits, and cause may be shown in the first instance; and, if no sufficient cause be shown, the rule may be made absolute, and a peremptory writ of mandamus issued, as therein provided.

1504 *Conditions precedent to the issue of the writ.*—To entitle a person to a mandamus, enjoining the performance of some particular act or duty, it must be shown that there has been a distinct demand of that which the person moving for the writ desires to enforce(*f*), and a refusal or withholding of compliance on the part of the defendant(*g*); but the objection that no sufficient demand and refusal appear must be taken before the merits are discussed(*h*).

(*d*) 1 Wm. 4, c. 21, s. 3; 17 & 18 Vict. c. 125, s. 68; *post*, p. 1288.

(*e*) Corner's Crown Practice (MANDAMUS).

(*f*) Reg. v. Brist. and Ex. Rail. Co., 4 Q. B. 169; 12 Law J., Q. B. 106. State v. Hull, 17 Minn. 429. Alexander v. McDowell, 67 N. C. 330. Crandall v. Amador, 20 Cal. 72. People v. Romero, 18 Cal. 89. State v. Governor, 1 Dutch. (N. J.) 331. State v. Lehere, 7 Rich. (S. C.) 234. Leonard v. House, 15 Ga. 473. Lewis v. Henley, 2 Carter (Ind.), 332. But see Commonwealth v. Commissioners, etc., 37 Penn. St. 237; Motter v. Primrose, 33 Md. 492.

(*g*) Rex v. Brecknock, etc., Canal Co., 3 Ad. & E. 229. Reg. v. Trustees of Cheadle Highway, 7 Jur. 373. Reg. v. Norwich and Brandon Rail. Co., 3 D. & L. 385.

(*h*) Reg. v. East Co. Rail. Co., 10 Ad. & E. 531. State v. Lehere, 7 Rich. (S. C.) 234.

Where a party applies for a mandamus to compel churchwardens to allow the applicant to inspect parish accounts, he must state some special reasons on public grounds for the desired inspection; his right as a parishioner being a mere private right in respect of which a mandamus will not be granted(*i*).

1505 *Requisites of the writ.*—If a writ of mandamus command the defendant to do more than he is under a legal obligation to perform, the writ is invalid, and will be quashed(*k*). And where a mandamus orders several things to be done, and is bad in respect of one of the things commanded, it is bad *in toto*(*l*). If the writ omits a necessary fact, it cannot be cured by the return(*m*). But a defective statement of a valid claim, if that statement renders it necessary to establish facts, which being established would support the claim to the writ, is cured by verdict, although it might be fatal on demurrer (*n*).

A writ of mandamus may be questioned by showing that the title set out does not warrant the mandatory part of the writ. Thus, if there is any discretion to be exercised as to the time when a thing is to be done, or if the time or mode of performance is conditional, or dependent upon a contingency, a writ commanding the doing of the thing at once, without giving any discretion, or providing for the contingency, will be defective(*o*). So where an Act of Parliament directs one or other of two things to be done, the party who is to do the act has the option of doing which thing he pleases. A writ of mandamus, therefore, founded on the statute and failing to give the election, is invalid, unless it assigns some sufficient reason why the party is no longer to have his election(*p*).

The writ may be very general in its terms, showing what ought to be done by the defendants, and what is required to be done by them, but the return to the writ must be particular and minute(*q*).

A writ of mandamus to a corporation or chartered company, to compel the payment of a sum of money, should show on the face of it

(*i*) Rex v. Clear, 4 B. & C. 901; Rex v. Smallpiece, 2 Chit. 288.

(*k*) York and North Mid. Rail. Co. v. Milner, 15 Law J., Q. B. 379. Reg. v. Lond. & South-West. Rail. Co., 17 Law J., Q. B. 326. Reg. v. Ledgard, 1 Q. B. 623. Reg. v. Caledonian Rail. Co., 16 Q. B. 19.

(*l*) Reg. v. Tithe Com., 19 Law J., Q. B. 177.

(*m*) Reg. v. South-East. Rail. Co., 4 H. L. Ca. 471; 20 Law J., Q. B. 428.

(*n*) Delamere (Lord) v. The Queen, L. R., 2 H. of L. 419.

(*o*) Reg. v. St. Luke's, Chelsea, 31 Law J., Q. B. 50.

(*p*) Reg. v. South-Eastern Rail. Co., *supra*.

(*q*) Reg. v. Southamption Port Commissioners, 1 B. & S. 5; 30 Law J., Q. B. 244; L. R., 4 Eng. & Ir. App. 449. The writ, however, must not be uncertain. See People v. Brooks, 57 Ill. 142; Hartshorn v. Ellsworth, 60 Me. 276.

that the remedy by way of action or distress, for the recovery of the money, is not available(*r*).

1506 *Parties to whom the writ is to be directed.*—Writs of mandamus must be directed to those, and those only, who are to obey the writ. Therefore, "if the writ be directed to the coroner and sheriff, where it ought to be one only, it is naught"(*s*). And so it is if it be directed to a corporation in a wrong name(*t*); but it may be directed either to the corporation in its corporate name or to those who by the constitution of the corporation ought to do the act(*u*). A mandamus to compel the admission to customary or copyhold estates must be directed to the lord and steward jointly, and not to the steward alone, in order that the interests of the lord may be effectually protected(*x*). It is at the peril of the person who desires the writ to have it properly directed(*y*).

1507 *Service of the writ* may be effected by delivery of a copy of the writ, but the original writ ought to be shown to each party served at the time of the delivery of the copy(*z*).

1508 *Return to the writ.*—The first writ of mandamus always concludes with a command of obedience, or cause to be shown to the contrary(*a*); and the 9 Anne, c. 20(*b*), requires a return to be made to the first writ. The return is generally indorsed on the original writ, and professes to be the answer of the parties to whom the writ is directed, who humbly certify, and return to their sovereign lady, the Queen, at the time and place in the writ mentioned, either that they have done what by the said writ they are commanded to do, using generally the very words of the mandatory part of the writ(*c*), or, if they have not yielded strict or substantial obedience, setting forth the grounds and reasons for their disobedience, which reasons must be fully and carefully specified, and shown to be sufficient in law to excuse or justify such disobedience.

(*r*) Rex *v.* Margate Pier Co., 3 B. & Ald. 224. Reg. *v.* Hull and Selby Rail. Co., *ante*, p. 1284.

(*s*) Reg. *v.* Hereford (Mayor, etc., of), 2 Salk. 701.

(*t*) Rex *v.* Ripon (Mayor of), ib. 433. Rex *v.* Norwich (Mayor, etc.), 1 Str. 55.

(*u*) Rex *v.* Abingdon (Mayor, etc.), 1 Ld. Raym. 559. Fuller *v.* Plainfield Academic School, 6 Conn. 532; Mayor v. Lord, 9 Wall. 409. People *v.* Common Council of New York, 3 Abb (N. Y.) App. Decis. 502.

(*x*) Reg. *v.* Powell, 1 Q. B. 360.

(*y*) Rex *v.* Curghey, 2 Burr. 782.

(*z*) Reg. *v.* Birm. etc., Rail. Co., 1 Ell. & Bl. 253; 22 Law J., Q. B. 195. Corner's Crown Pr., p. 227.

As to the mode of service on a board of supervisors under the statutes of Wisconsin (Rev. Stat. ch. 159, s. 1), see Haveyrêyer *v.* Mineral Point Supervisors, 22 Wis. 396.

(*a*) Corner's Crown Pr., MANDAMUS.

(*b*) Extended by 1 Wm. 4, c. 21, s. 3, to all writs of mandamus.

(*c*) Corner's Crown Pr., MANDAMUS, Appendix.

When the writ has been issued to a judge, magistrate, or judicial officer, commanding him to receive, hear, and determine the merits of an information or complaint which he has wrongfully refused to hear, it is a sufficient return, that he has received, heard, and determined, or that he has received, heard, and dismissed, the information or complaint. The court cannot, as we have seen, interfere with the decision, however erroneous it may be(*d*).

The return, being matter of record, need not, when made by a corporation, be under the corporate seal(*e*).

It is not necessary, in order to support the return, that every part of it should be good; it is sufficient if enough appear to show a good justification, or a good legal reason, why the mandamus should not be obeyed(*f*). If, therefore, a return is good in part, and bad in part, the good may be separated from that which is bad(*g*).

1509 *The return to a mandamus to restore a dismissed public officer to his office*, must set out all the necessary facts precisely, to show that the party has been removed in a legal and proper manner, and for a legal cause; and, where he has been discharged for misconduct, that he was previously heard in his own defence, or that he was summoned to answer the charge and made default, and that the charge was proved against him(*h*).

1510 *Return setting up inability or impossibility of performance—Expiration of statutory power.*—A writ of mandamus supposes the required act to be possible, and to be obligatory when the writ issues. Generally speaking, the writ suggests facts showing the obligation and the possibility of fulfilling it, and a return pursuing this suggestion, and traversing it, is good. Where the alleged obligation is founded on public Acts of Parliament recited in the writ and return, and it appears that the statutory power has expired, the writ of mandamus is bad, and will be quashed(*i*). It is, however, no objection to an application for a mandamus to levy a rate, that there are funds to pay the amount required, and therefore that a fresh rate may not be necessary(*k*).

1511 *Pleas to the return—Traverse of material allegations.*—By 9 Anne,

(*d*) Reg. *v.* Mainwaring, Ell. Bl. & Ell. 474; *ante*, pp. 860, 864.

(*e*) Rex *v.* Exeter (Bishop, etc.), 1 Ld. Raym. 223.

(*f*) Rex *v.* York (Archbishop of), 6 T. R. 493. Rex *v.* Griffiths, 5 B. & Ald. 735. Rex *v.* London (Mayor, etc. of), 3 B. & Ad. 268. Selma, etc. R. R. Co., *Ex parte*, 46 Ala. 230.

(*g*) Reg. *v.* New Windsor (Mayor of), 7 Q. B. 917. Com. Dig. MANDAMUS.

(*h*) Rex *v.* Liverpool (Mayor of), 2 Burr. 733. Rex *v.* Faversham Fish Co., 8 T. R. 352. Rex *v.* Lyme Regis (Mayor, etc.), 1 Doug. 149.

(*i*) Reg. *v.* Lond. and North-West. Rail. Co., 16 Q. B. 894. Reg. *v.* Ambergate, etc., 1 Ell. & Bl. 381.

(*k*) Ringland *v.* Lowndes, 33 Law J., C. P. 25.

c. 20, s. 2, it is enacted, that every person prosecuting a writ of mandamus may plead to, or traverse, all or any of the material facts contained in the return, to which the person making the return shall reply, take issue, or demur, and such further proceedings shall be had for the determination thereof as might have been had if the person suing the writ had brought his action on the case for a false return; and if any issue be joined on such proceedings, the person suing the writ may try the same as an issue joined in such action on the case would be tried; and in case a verdict shall be found for the person suing the writ, or judgment be given for him upon demurrer, or by *nil dicit*, or for want of a replication or other pleading, he shall recover his damages and costs in such manner as he might have done in such action on the case, and a peremptory writ of mandamus shall be granted without delay for him for whom judgment shall be given, as might have been done if the return had been adjudged insufficient. And in case judgment shall be given for the person making the return, he shall recover his costs of suit. But it is provided (s. 3), that if any damages shall be recovered by virtue of that act against any persons making such return, they shall not be liable to be sued in any other action for making such return. And the courts are to allow (s. 3) to persons to whom any writ of mandamus may be directed, or to persons who shall sue or prosecute the same, such convenient time to make a return, plead, reply, rejoin, or demur, as shall seem just and reasonable. And the 4 Anne, c. 16, and all statutes of jeofails, are thereby and (s. 7) extended to all writs of mandamus and proceedings thereon; by 1 Wm. 4, c. 21, s. 3, the several enactments contained in the 9 Anne, c. 20, relating to the return, and the proceedings on such return, and to the recovery of damages and costs, are extended to all writs of mandamus and the proceedings thereon(*l*).

When the real object of the proceeding by mandamus is the recovery or enforcement of a civil right, the mandamus is in effect a civil action. Several matters, therefore, may be pleaded to the return, and orders for the inspection of documents will be made, as in any ordinary action(*m*).

1512 *Statutory protection to certain public officers*, to whom writs of mandamus are directed, is given by 1 Wm. 4, c. 21, s. 4, which recites that writs of mandamus (other than such as relate to the offices and franchises mentioned in 9 Anne, c. 20) are sometimes issued to officers and other persons commanding them to admit to offices, and perform

(*l*) See Reg. v. Fall, 1 Q. B. 636. (*m*) Reg. v. Ambergate, etc., 17 Q. B. 927.

other matters in respect wherof the persons to whom the writs are directed claim no right or interest, or whose functions are merely ministerial in relation to such offices, and that it may be proper that such officers should in certain cases be protected against the payment of damages or costs; wherefore it is enacted, that it shall be lawful for the court to which such application is made for the writ of mandamus (other than such as relate to the offices and franchises mentioned in the statute of Anne), to make rules and orders calling not only upon the person to whom the writ may be required to issue, but also upon every other person having or claiming any right or interest in or to the matter of the writ, to show cause against the issuing of the writ and payment of the costs of the application, and upon the appearance of such other person in compliance with such rules, or in default of appearance, after service thereof, to exercise such powers and authorities, and make such rules and orders as may be made under the Interpleader Act, 1 & 2 Wm. 4, c. 58 (*ante*, p. 556), for giving relief against adverse claims made upon persons having no interest in the subject of such claims(*n*); but it is provided, that the return to be made to the writ and issues joined in fact or law upon any traverse thereof, or upon any demurrer, shall be made and joined by, and in the name of, the person to whom the writ is directed; but the same may, if the court so direct, be expressed to be made and joined on behalf of such other person as may be mentioned in such rules; and, in that case, such other person may frame the return, and conduct the subsequent proceedings at his own expense; and, in such case, if any judgment shall be given for or against the party suing the writ, the judgment shall be given against or for the person on whose behalf the return shall be expressed to be made, and who shall have the like remedy for the recovery of costs, and enforcing the judgment, as the person to whom the writ has been directed would otherwise have had.

When the return is made on behalf of a third party under the authority of the statute, the proceedings are not to abate on the death, resignation, or removal from office of the person having made such return, but may be carried on in the name of such person; and if a peremptory writ is awarded, it may be directed to any successor in office or right to such person (s. 5).

After a demurrer to a return made by the party to whom the writ has been delivered, the court will, in the exercise of the powers of this statute, let in another party really interested in the matter to join in

(*n*) See 1 & 2 Wm. 4, c. 58, s. 8.

making an amended return(*o*); but the party who seeks to come in must satisfy the court, or a judge at chambers, that there is reason for his claim, and that he is acting *bonâ fide*, and is not merely seeking to raise frivolous objections(*p*).

1513 *Time for taking objections to the writ.*—There are cases where it has been held that, after a return to a mandamus, the court will not allow the validity of the writ to be questioned; but on a concilium, where the whole record is set down for argument, the defendant has a right to object to the writ in matters of substance, as much as a defendant has a right to object to a declaration where the whole record is set out upon demurrer, or writ of error after plea, in civil proceedings(*q*). The question whether the writ does, or does not, upon the face of it, disclose a good legal ground, for the issue of it may be raised at any stage of the proceedings; and the court will, at any time before a peremptory writ of mandamus issues, examine whether the writ is so framed as to give them jurisdiction(*r*). But where the writ is good upon the face of it, and a return has been made, and an issue thereon tried, the court will not quash the writ on grounds which do not appear on the record, and which might have been shown against making the rule absolute(*s*).

1514 *Review of proceedings in mandamus by writ of error.*—By 6 & 7 Vict. c. 67, s. 1, it is enacted, that whenever the person prosecuting a writ of mandamus wishes to object to the validity of the return, he shall do so by way of demurrer to the same, and thereupon the writ and return, and the demurrer, shall be filed of record, and proceedings taken as upon demurrer to pleadings in personal actions; and the courts shall thereupon adjudge either that the return is valid in law, or that it is not valid; or that the writ of mandamus is not valid; and if they adjudge that the writ is valid, but that the return is not valid, then they shall also by their judgment award that a peremptory writ of mandamus shall issue, which writ may be sued out within four days; and the courts are required by their judgment to award costs to be paid to the party in whose favor they decide.

And whenever any such judgment has been given, or whenever issue in fact or in law has been joined upon the pleadings, and judg-

(*o*) Reg. *v.* Paynter, 14 Law J., M. C. 182.
(*p*) Reg. *v.* Cheek, 9 Q. B. 947; 16 Law J., M. C. 65.
(*q*) Reg. *v.* Powell, 1 Q. B. 360.
(*r*) Clarke *v.* Leicester, etc., Canal Co., 6 Q. B. 902. Rex *v.* Margate Pier Co., 3 B. & Ald. 224.
(*s*) Reg. *v.* Stamford (Mayor of), 6 Q. B. 441.

ment given thereon, any party to the record who thinks himself aggrieved by the judgment may sue out a writ of error to reverse it, and proceedings thereon are to be taken, and costs awarded, as in ordinary cases of writs of error upon judgments. Provision is made for the issue of a peremptory writ of mandamus in case of the reversal of the judgment of the court below; and it is declared that no action shall be prosecuted against any person for anything done in obedience to a peremptory writ of mandamus.

1515 *Damages and costs.*—Wherever a party traversing a return obtains a verdict, he is now, since the passing of the 1 Wm. 4, c. 21, s. 3 (*ante*, p. 1284), entitled to some damages and costs; and if, at the trial of any issue raised on a traverse of any material allegation contained in the return, the jury omit to find damages, the judge who tried the cause may order, from his recollection, the verdict to be entered on the postea for nominal damages, to enable the successful party to recover his costs(*t*).

The costs for the application for the writ, independently of the trial of issues of fact raised by traverse or the return, etc., are regulated by the 1 Wm. 4, c. 21, s 6, which enacts, that in all cases of application for a writ of mandamus, the costs of the application, whether the writ shall be granted or refused, and also the costs of the writ, if the same shall be issued and obeyed, shall be in the discretion of the court; and the court is authorized to order and direct by whom and to whom the same shall be paid.

1516 *Judgment non obstante veredicto.*—Where the issues raised are altogether upon immaterial points, and the return is virtually and substantially a good return, the court will give judgment for the defendant, notwithstanding the finding of the jury on those immaterial issues for the plaintiff(*u*).

1517 *Action or information for a false return.*—Actions for a false return are maintainable by the party injured or aggrieved thereby(*x*), unless damages have been recovered by him, under the statute of Anne, against the person making the return, upon a traverse of the facts contained therein, and an issue thereupon raised under the statute (*ante*, p. 1283). The action must be brought against the party or parties who caused the return to be made(*y*). It is not maintainable

(*t*) Reg. v. Fall, 1 Q. B. 636. As to costs in error, see *supra*.
(*u*) Reg. v. Darlington School Governors, 6 Q. B. 719.
(*x*) Green v. Pope, 1 Ld. Raym. 125. Vaughan v. Lewis, Carth. 227.
(*y*) Rex v. Ripon (Mayor of), 1 Ld. Raym. 564.

against one who voted against the false return, and was consequently no party to it(z).

If the matter of the return concerns the public government, and no particular person is so concerned or interested as to be aggrieved or injured thereby, an information may be filed against the particular persons joining in and making the false return(a).

1518 *Attachment for disobedience of peremptory writ of mandamus.*—Objections to the validity of a peremptory writ of mandamus may be taken on a motion for an attachment, and it may be shown that the writ either commands the defendant to do more than he is bound to do, or that he is enjoined to do it in some particular mode, where the law gives him an option or discretion in the mode of performance. But no return will be permitted to a peremptory writ of mandamus other than a certificate of perfect obedience and due execution of the writ(b).

SECTION II.

OF THE CLAIM TO A WRIT OF MANDAMUS IN AN ACTION AT COMMON LAW.

1519 *Of the union of an action in respect of a private injury with an application for a mandamus.*—By the Common Law Procedure Act, 17 & 18 Vict. c. 125, it is enacted (s. 68), that the plaintiff, in any action in any of the superior courts, except replevin and ejectment, may indorse upon the writ and copy to be served a notice that the plaintiff intends to claim a writ of mandamus, and the plaintiff may thereupon claim in the declaration, either together with any other demands which may now be enforced in any such action, *or* separately(c), a writ of mandamus commanding the defendant to fulfil any duty in the fulfilment of which the plaintiff is personally interested. The declaration in such action (s. 69), is to set forth sufficient grounds upon which such claim is founded, and that the plaintiff is personally interested therein, and that he sustains, or may sustain, damage by the non-performance of such duty, and that performance thereof has been demanded by him, and refused or neglected. The pleadings and other proceed-

(z) R. v. Pilkington, Carth. 172.
(a) Surgeons' Company's case, 1 Salk. 374. Rex v. Abingdon (Mayor of), 2 Salk. 431.
(b) Reg. v. Ledgard, 1 Q. B. 616.
(c) See Fotherby v. Metrop. Rail. Co., *post*, p. 1289.

ings in any action in which a writ of mandamus is claimed (s. 70) are to be the same, as nearly as may be, and costs are to be recoverable by either party, as in an ordinary action for the recovery of damages. In case judgment is given for the plaintiff, that a mandamus do issue, the court in which such judgment is given may (s. 71), if it shall see fit, besides issuing execution in the ordinary way for the costs and damages, also issue a peremptory writ of mandamus to the defendant, commanding him forthwith to perform the duty to be enforced. The writ need not recite (s. 72), the declaration or other proceedings, or the matter therein stated, but may simply command the performance of the duty, and may, in other respects, be in the form of an ordinary writ of execution, except that it must be directed to the party, and not to the sheriff, and may be issued in term or vacation, and returnable forthwith; and no return thereto, except that of compliance, is to be allowed; but time to return it may, upon sufficient grounds, be allowed by the court or a judge, either with or without terms. An action for a mandamus may be maintained separately, *i.e.*, without the commencement of another action, and it lies whenever a public duty, in the fulfilment of which the plaintiff is interested, is created by statute, whether the plaintiff has sustained damage or not(*d*).

The writ of mandamus so issued is to have (s. 73) the same force and effect as a peremptory writ of mandamus issued out of the Court of Queen's Bench, and, in case of disobedience, may be enforced by attachment. The court may (s. 74), upon application by the plaintiff, instead of proceeding against the disobedient party by attachment, direct that the act required to be done may be done by the plaintiff, or some other person appointed by the court, at the expense of the defendant; and, upon the act being done, the amount of such expense may be ascertained by the court, either by writ of inquiry or reference to a master, as the court or judge may order; and the court may order payment of the amount of such expenses and costs, and enforce payment thereof by execution.

We have seen that the prerogative writ of mandamus is never granted for the enforcement of a mere private duty, where there is a clear cause of action, and compensation in damages would be an effectual remedy (*ante*, p. 1264). And the same rule has been held to apply to the action of mandamus; and that where the duty to be performed is nothing more than the ordinary duty springing out of a contract in respect of which an action for damages is the appropriate

(*d*) Fotherby *v.* Metrop. Rail. Co., L. R., 2 C. P. 188.

remedy, the action for a mandamus does not lie. A mandamus, therefore, cannot be claimed to make a debtor pay a mere private debt, in respect of which the ordinary remedy by action is available(*e*).

1520 *Actions in which a claim for a mandamus may be sustained.*—Wherever, by charter or Act of Parliament, a duty is imposed upon a corporate body or chartered company, in the fulfilment of which the plaintiff is interested, and in respect of the non-fulfilment of which the plaintiff is entitled to maintain an action for damages, he may in the same action claim a mandamus for the fulfilment of the duty(*f*). Thus where the plaintiff, in an action for a mandamus against a trading company, set forth the incorporation of the company by letters patent, directing amongst other things that the capital of the company should be divided into shares, and provision made for the registration of the names of all the proprietors of such shares; and showed that a register of shareholders had been established, in conformity with the provisions of the charter; and that the plaintiff was entitled, as the executor of a deceased shareholder, to have his name inserted in such register; averring that he was personally interested, etc., and had sustained damage, and had made a demand on the company to have his name entered, and that they had refused, etc., it was held on demurrer that the plaintiff was entitled to the writ; for wherever there is a duty in the fulfilment of which the plaintiff is personally interested, and which ought to be fulfilled under royal charter, the non-performance being a grievance to an individual, that is a case for an action for a mandamus(*g*). It is a case also, as we have seen, where a prerogative writ would be granted independently of the statute(*h*).

So, where the plaintiff having set forth that the defendants were a joint-stock company, duly incorporated under the Joint-Stock Companies Act, and that the plaintiff was duly entered on the register of shareholders as a holder and proprietor of certain shares, numbered, etc., and that the defendants removed his name from the register, and refused, after demand, to restore it, etc., and claimed damages and a mandamus, is was held that the claim was properly made(*i*).

(*e*) Bush *v.* Beavan, 32 Law J., Exch. 54; 1 H. & C. 500. Benson *v.* Paul, 6 Ell. & Bl. 273; 25 Law J., Q. B. 274.

(*f*) See Morgan *v.* Metrop. Rail. Co., L. R., 3 C. P. 553.

(*g*) Ld. Campbell, Norris *v.* Ir. Land Co., 8 Ell. & Bl. 512; 27 Law J., Q. B. 116. But a company is not bound to register a transfer not in accordance with the statutable form. Reg. *v.* Gen. Cem. Co., 6 Ell & Bl. 415; 25 Law J., Q. B. 342. Copeland *v.* North-East Rail. Co, 6 Ell. & Bl. 277.

(*h*) *Ante*, pp. 1273, 1274.

(*i*) Swan *v.* Brit. Austr. Co., 7 H. & N. 604; 2 H. & C. 175. Ward *v.* South-East. Rail. Co., 29 Law J., Q. B. 177.

Where the plaintiff, in his declaration against the clerk of a local board of health, set forth that certain improvement commissioners, appointed under a local Act, contracted to pay him a certain sum for certain services towards carrying into effect the purposes of the Act; that the services were rendered, but the commissioners neglected to pay, and that afterwards, by virtue of another Act of Parliament, the duties of the commissioners were transferred to the local board of health; and it was enacted that all debts payable by the commissioners should be satisfied by the local board out of rates they were authorized to levy; and the declaration went on to show that the debt remained unpaid; that the plaintiffs were personally interested in the levying a rate for payment thereof; that they had demanded and been refused payment and a rate, and sustained damage; and they then claimed a mandamus; and the cause went to trial, and the damages were assessed, it was held that the plaintiff was entitled to the mandamus claimed. "The provisions of the Common Law Procedure Act," observes Hill, J., "now enable a plaintiff, in an action in which he might recover judgment, but could not have execution, and would have had to apply for a mandamus, to combine a claim for a mandamus with his action, so that if he succeeds, a mandamus issues as part of the judgment. In such a case, I think the amount of the debt for which the mandamus is ultimately to issue may be ascertained in the action"(*k*).

Commissioners, or the members of a local board, appointed annually for executing the powers of a local Act of Parliament, are generally a fluctuating body in the nature of a corporation, represented by their clerk, who is the party, as we have seen, to be sued for services rendered them for purposes within the scope of the Act(*l*). But for the statute, the commissioners who retain, or order the services to be rendered by, the plaintiff would be personally liable; but as they are acting for public purposes under statutory authority, with power over a public fund created by the statute, they are generally expressly exempted from personal liability, and the burthen of satisfying and discharging the debts they incur in the execution of the purposes of the Act is thrown upon the fund they are authorized to administer. An action to enforce payment of these debts must, as we have seen, be brought against them in the name of their clerk, and when judgment is obtained against the clerk, the public fund, or the rates, are to be

(*k*) Ward *v.* Lowndes, 1 Ell. & Ell. 940; 28 Law J., Q. B. 265; 29 Ib. 40.
(*l*) *Ante*, p. 917. Bush *v.* Martin, 33 Law J., Exch. 17.

resorted to for its satisfaction, and not the private property of the commissioners(*m*). If, therefore, after judgment has been recovered against the clerk, a demand is made upon the commissioners for satisfaction and discharge of the judgment debt, and they neglect to provide themselves with funds, or to make the payment, an action for damages may be brought upon the judgment, and the claim for a mandamus therewith, to compel the levying of a rate and the satisfaction and discharge of the judgment debt. But, in these cases, the old prerogative writ of mandamus would seem to afford as convenient a remedy for enforcing satisfaction of the judgment debt(*n*) as the bringing of a second action for a mandamus. If a second action is brought it must, in many cases, be commenced within six months of the recovery of the judgment(*o*); and it must appear that the judgment has been recovered against the clerk or secretary of the board in respect of some act or proceeding by the members of the board in the *bonâ fide* execution of the statutory powers entrusted to them, so as to exempt them, and their clerk or secretary, from personal liability(*p*); for if they have exceeded the powers conferred upon them, and are not protected from personal liability by the statute, they cannot charge the debts they incur, or the consequences of their unauthorized proceedings, upon the rates, and a mandamus cannot issue to compel them to do what they have no power or authority to do(*q*).

1521 *Actions in which a claim for a mandamus cannot be sustained.*—If, in an action for a mandamus, nothing more appears upon the record than that the action is brought for the recovery of a debt incurred by the members of some local board, commissioners, or corporate body, acting in discharge of public duties, or in the exercise of statutory powers, and there is nothing to exclude the personal liability of the defendants, and to show that the ordinary remedy by action would not be available, a claim for a mandamus cannot be sustained. Thus, where the plaintiffs in an action for a mandamus set forth that the defendant, as clerk to certain commissioners, for putting into execution a local improvement act, became indebted to the plaintiffs for certain salary, due to them for services rendered to the commissioners under the provisions of the Act, upon the retainer and request of the Commissioners, and

(*m*) Hall *v.* Taylor, Ell. Bl. & Ell. 107; 27 Law J., Q. B. 311. Kendall *v.* King, 17 C. B. 483; *ante*, pp. 890–892.
(*n*) *Ante*, pp. 1276, 1277.
(*o*) Burland *v.* Kingston etc., Local Board, *ante*, p. 1277.
(*p*) Southampton, etc., Bridge Co. *v.* Southampton Local Board, *ante*, p. 890.
(*q*) Duncan *v.* Findlater, *ante*, p. 891. Bush *v.* Beavan, 32 Law J., Exch. 58.

also for work and labor, journeys and attendances, as solicitors for the commissioners upon their retainer, etc., and for fees, etc., money paid, etc., and on account stated, and that these debts were a charge upon any moneys and funds which might be in the hands of the commissioners, if the commissioners had funds, and, if not, then upon a rate leviable under the statute; that the plaintiffs were personally interested, etc.; that they demanded and were refused payment, and sustained damage, etc., and the plaintiffs then claimed a mandamus, it was held, on demurrer, that no right to a mandamus had been shown, for there were various ways in which the commissioners might retain the services of an attorney in matters relating to their official duties, and become personally liable in respect thereof; and there was nothing to show that the debt claimed could not be recovered by the ordinary remedy by way of action of debt. "The mandamus in this case," observes Channel, B., "is to pay out of the rates, or to levy rates for the purpose; it is objected that the writ is bad from being in the alternative; but passing this by, both branches of the alternative assume and imply a legal duty, when the writ of mandamus issued, to pay these claims out of the rates, or levy rates for the purpose; and this without even alleging that the services were rendered to, or on the retainer or request of, the commissioners *as such*, or for business done in carrying out the purpose of the Act. Assuming the services not to have been in execution of the powers of the Act, then they would not be even payable out of the rates"(*r*).

1522 *Declaration in an action for a mandamus.*—When the mandamus is claimed for the satisfaction and discharge of a pecuniary demand, it must be shown, as we have seen, that it does not constitute a mere private debt, in respect of which the ordinary action of debt would be an available remedy, but that the only mode of obtaining payment is by recourse to a rate, the duty of making and levying which is, by statute or royal charter, imposed upon the defendants. The declaration need not state the precise amount due, as in the case of the prerogative writ of mandamus to enforce a judgment obtained against an officer of a corporation; but the plaintiff is at liberty to allege the existence of the debt generally, leaving it to the jury to find the precise amount for which the mandamus claimed is to issue, and when

(*r*) Bush *v.* Beavan, 32 Law J., Exch. 60. Some of the passages in the judgment in this case do not appear to be reconcileable with the judgment of the Court of Queen's Bench, in narrowing the operation of ss. 69, 70 and 71, of the Common Law Procedure Act, 17 & 18 Vict. c. 125, *ante*, pp. 1288–89. Ward *v.* Lowndes, 1 Ell. & Ell. 940; 28 Law J., Q. B. 295; *ante*, p. 1292.

that amount is found by them, the mandamus forms part of the judgment in the action(*s*).

1523 *The pleadings in the action* are, as previously mentioned, to be the same, as near as may be, as in an ordinary action for the recovery of damages (*ante*, p. 1080).

1524 *Orders for the rectification of the register of shareholders in joint-stock companies.*—The 25 & 26 Vict. c. 89, s. 35, enables any of the superior courts of law or equity to make orders for the rectification of the register of shareholders of registered joint-stock companies, on the application of persons entered, or omitted to be entered, on the register, or if unnecessary delay takes place in entering on the register the fact of a person having ceased to be a member(*t*), and to decide on the title of the applicant to have his name entered on, or erased from, the register; but when once a person has been put on the register, the company cannot erase his name therefrom, except at the instance of a party having a better title, or by showing that the registration is a nullity, by reason of fraud, misrepresentation or forgery(*u*). The courts will not exercise the powers given by this section, except in cases which are clear and free from complication(*x*).

Most of the applications for the rectification of the registers under the above section take place on the winding up of a company(*y*), and in deciding them the court will take into consideration who is the applicant, whether the official liquidator, as the representative of the company, or the transferor of shares, the transfer of which was not registered before the commencement of the winding up(*z*). The directors of a company have no discretionary power, independently of any power expressly given them by the articles of association, to refuse to register a transfer which has been *bonâ fide* made. Where, therefore, a transferee gave an address at which he was only an occasional visitor, it was held that the directors were bound to register the transfer, although the company was then in difficulties, the transferee a person of small means, and the shares were sold by the transferor in order to get rid of his liability(*a*). Where, however, a discretion

(*s*) Ward *v.* Lowndes, 1 Ell. & Ell. 940; see *ante*, pp. 1291, 1292.

(*t*) See Lowe's case, L. R., 9 Eq. Ca. 589.

(*u*) Swan, *Ex parte*, 7 C. B., N. S. 400; 30 Law J., C. P. 113. Addison on Contracts, 6th ed., pp. 131-134.

(*x*) *Re* Heaton Steel and Iron Co., Simpson's case, L. R., 9 Eq. Ca. 91.

(*y*) Musgrave's case, L. R., 5 Eq. Ca. 198. Sahlgreen's case, L. R., 3 Ch. App. 323. *Re* Bank of Hindustan, China and Japan, *Ex parte* Kintrea, L. R., 5 Ch. App. 95. As to such applications by an infant, see Hart's case, L. R., 6 Eq. Ca. 512. Lumsden's case, L. R., 4 Ch. App. 31.

(*z*) Sichell's case, L. R., 3 Ch. App. 119.

(*a*) Weston's case, L. R., 4 Ch. App. 20; ibid., 6 Eq. Ca. 238.

is given to the directors by the articles of association, a transferor cannot claim to have his name removed from the register under the above section, on the ground of unnecessary delay, unless the transferee be a responsible person(*b*). And there is no duty, it seems, on the part of a company to communicate a refusal to register to the transferor(*c*).

"We must not," says Kelly, C.B., "exceed the powers conferred upon us by this section." An application, therefore, by a person to have his name removed from the register has been refused, as not coming within the terms of the section, although it had been decided in an action by the company against him, that he was not liable to calls, on the ground that the company could not lawfully commence business without having passed a certain resolution, which they had not passed(*d*).

Where shares belonging to a person have been transferred by a forged transfer, the real owner may under the above section obtain the restoration of his name to the register(*e*); and the company which has registered the forged transfer, and which, by giving certificates to the forger, has thus enabled him to hold himself out to the world as the owner of the shares, is estopped from denying its liabilty to an innocent purchaser for value, who has, in reliance upon such certificate, purchased the shares from the forger, and will be liable to pay to such purchaser, as damages, the value of the shares at the time it first refused to recognize him as a shareholder, with interest at four per cent(*f*).

(*b*) Shipman's case, L. R., 5 Eq. Ca. 219. And see Holden's case, L. R., 8 Eq. Ca. 444.
(*c*) Gustard's case, L. R., 8 Eq. Ca. 438; 38 L. J., Ch. 610.
(*d*) *Ex parte*, Ward, 37 Law J., Exch. 83.
(*e*) Or he may file a bill in Chancery. Johnson *v.* Renton, L. R., 9 Eq. Ca. 181.
(*f*) *Re* Bahia and San Francisco Rail. Co., *ante*, p. 1179.

CHAPTER XXV.

TORTS BY MUNICIPAL CORPORATIONS, AND REMEDIES THEREFOR.

SECTION I.—*Liability of municipal corporations.*—General rule as to liability for torts—Liabilities of quasi corporations—Implied liability of municipal corporations proper—Liability for torts of officers and agents—No liability in respect to exercise of discretionary powers—Property destroyed by mobs—Buildings destroyed to prevent fire—Not liable for consequential damages—Liability for defective streets and sidewalks—Liability for defective drains and sewers—Liability as to watercourses and surface water—Liability for nuisances maintained on corporate property—Liability for obstructions to navigation—Miscellaneous liabilities.

SECTION II.—*Remedies for torts by municipal corporations.*—Remedy by action or indictment—Parties to actions for torts of—Pleadings in actions for torts of—Evidence in actions for torts of—Damages recoverable in actions against—Remedy by indictment.

SECTION I.

LIABILITY OF MUNICIPAL CORPORATIONS.

1525 *General rule as to liability for torts.*—Although the general doctrine is well settled, that an action sounding in tort may be maintained against a municipal corporation, it is impossible to state any rule definitely pointing out the cases in which such an action will lie. As it has been truly expressed, "all that can be done with safety is to determine each case as it arises"(*a*). A municipal corporation, like all other corporations, is of statutory creation; and in every case the liability of a body created by statute must be determined under a true interpretation of the statutes under which it is created(*b*). It may

(*a*) Foote, J., in Lloyd *v.* Mayor, etc., of New York, 5 N. Y. 369.

(*b*) Mersey Docks *v.* Gibbs; Same *v.* Penhollow, Law R., 1 H. L. C. 93. *S. C.*, 1 H. & N. 439; 3 id. 164. Little Rock *v.* Willis, 27 Ark. 572. Richmond *v.* Long's Administrators, 17 Gratt. (Va.) 375.

be stated generally, however, in illustration of the subject under consideration, that, in the absence of any statutory provision or necessary intendment to the contrary, a municipal corporation may be liable, in an action on the case, for an act which would warrant a like action against an individual; provided, the act is done by the express authority of the corporation, or of a branch of its government, empowered to act for it upon the subject to which the particular act relates, or if, after the act has been done, it has been fully ratified by the corporation(*c*). Thus, a municipal corporation has been held liable for injury resulting from the insufficient construction of its public works(*d*). So, a municipal corporation has no more right to erect and maintain a nuisance than a private person possesses(*e*); and is *primâ facie* liable for the continuance of a private nuisance created by itself(*f*). And, in general, municipal corporations are responsible, to the same extent, and in the same manner, as natural persons, for the negligence or want of skill of their agents in the construction of works for the benefit of their municipalities(*g*). Various modifications of these general statements will hereafter appear under appropriate heads.

1526 *Liabilities of quasi corporations.*—A plainly marked distinction is made, and should be observed, between municipal corporations proper, as incorporated villages, towns and cities, and those other organizations, such as townships, counties, school districts, and the like, which are established without any express charter or act of incorporation, and clothed with but limited powers. These latter political divisions are called *quasi* corporations, and the general rule of law is now well settled, that no action can be maintained against corporations of this class by a private person, for their neglect of public duty, unless such right of action is expressly given by statute(*h*). Thus in an early case arising in Massachusetts, it was decided that a *town* was not liable in a common law action for damages sustained by an individual through a defect in the highways of the town(*i*); and this decision has not only been generally followed throughout the New England States, but has been recognized elsewhere, and applied to other *quasi* corporations.

(*c*) Thayer *v.* Boston, 19 Pick. 511. Wilde *v.* New Orleans, 12 La. An. 15. Dayton *v.* Pease, 4 Ohio St. 80. Ross *v.* Madison, 1 Cart. (Ind.) 281.

(*d*) Rochester, etc. *v.* City, etc., 3 N. Y. 463. Mayor, etc., *v.* Bailey, 2 Denio, 433.

(*e*) Brower *v.* New York, 3 Barb. 254.

(*f*) Pennoyer *v.* Saginaw, 8 Mich. 534.

(*g*) Ross *v.* Madison, 1 Cart. (Ind.) 281.

(*h*) Larkin *v.* Saginaw Co., 11 Mich. 88. Treadwell *v.* Commissioners, 11 Ohio St. 190. Bray *v.* Wallingford, 20 Conn. 416. Hafford *v.* New Bedford, 16 Gray, 48. Van Epps *v.* Commissioners, 25 Ala. 460.

(*i*) Mower *v.* Leicester, 9 Mass. 247.

The result is the establishment of the rule of law above stated. It should be observed, however, that the rule is not of universal application, even as to towns, for there may be instances in which they are civilly liable for neglect of duty without such liability being expressly declared by statute(*j*). It is applied in the case of towns only to the neglect or omission of a town to perform those duties which are imposed upon all towns, without their corporate assent, and exclusively for public purposes, and not to the neglect of those obligations which a town incurs when a special duty is imposed on it, with its consent, express or implied, or a special authority is conferred on it, at its request. In the latter cases, a town is subject to the same liabilities for the neglect of those special duties, to which private corporations would be, if the same duties were imposed or the same authority conferred on them, including their liability for the wrongful neglect as well as the wrongful acts of their officers and agents(*k*). Among the illustrations of the doctrine stated, it has been held that a town which has assumed the duties of school districts, is not liable, in the absence of statutory obligation, for an injury to a scholar attending the public school, from a dangerous excavation in the school-house yard, owing to the negligence of the town officers(*l*). So, in Louisiana, no remedy is given by statute against a parish for a private injury caused by the absence of bridges, or a neglect to keep them in repair, and where it was not shown that the parish was under a legal obligation to keep the bridge over a certain watercourse always in repair, it was held not to be liable for damages occasioned by the ruinous condition of the bridge(*m*). A county is not responsible in the absence of a statute to the contrary, for injuries resulting from the unsafe and dangerous condition of county buildings, and especially where there exists no statute authorizing the levy of a tax to satisfy such a judgment(*n*). And in Georgia, it has been held that a county, although it is its duty to keep a good and sufficient jail, is not liable for an escape caused by the insufficiency of the jail, though the sheriff might have been made liable therefor, there being no statute giving such an action(*o*). So, a county, being a *quasi* corporation, is not liable for

(*j*) See Chisey *v.* Canton, 17 Conn. 475; Oliver *v.* Worcester, 102 Mass. 489; Blodgett *v.* Boston, 8 Allen, 237.

(*k*) Bigelow *v.* Randolph, 14 Gray, 541. See Eastman *v.* Meredith, 36 N. H. 284; Conrad *v.* Ithaca, 16 N. Y. 158.

(*l*) Bigelow *v.* Randolph, 14 Gray, 541. And see Jones *v.* New Haven, 34 Conn. 1.

(*m*) King *v.* St. Landry, 12 La. An. 858.

(*n*) Commissioners of Hamilton Co. *v.* Mighels, 7 Ohio St. 109. Morey *v.* Newfane, 8 Barb. 645.

(*o*) The Governor *v.* Justices, etc., 19 Ga. 97; and see Haygood *v.* Justices, 20 Ga. 845.

damages sustained by reason of the unskilful treatment of an indigent sick person in the county hospital by the resident physician, nor by reason of insufficient and unwholesome food and other necessaries there supplied to the patient(*p*). Superintendents of common schools, overseers of the poor, highway commissioners, county supervisors and the like officers, may also be classed among *quasi* corporations(*q*). In the state of New York, towns and counties are at most but *quasi* corporations(*r*); and it has been held that there is no obligation, either by statute or common law, upon towns, to keep in repair highways within their limits. Nor will an action lie against a town to recover damages for an injury occasioned by a defect in the highway(*s*).

1527 *Implied liability of municipal corporations proper.*—Municipal corporations proper, such as towns and cities specially chartered or voluntarily organizing under general acts are, by the decisions of the courts, held to a more extended liability than *quasi* corporations, even where the latter are invested with corporate capacity, and have the power of taxation(*t*). Thus, the former are held liable to persons injured by their neglect of duty, without an express statute giving the action, in cases where the latter incur no liability unless imposed by express legislative enactment(*u*). This distinction is said to arise from the double character possessed by municipal corporations proper—the one governmental, legislative or public; the other, in a sense, proprietary or private. In the one case, no private action lies unless it be expressly given; in the other there is an implied or common law liability for the negligence of their officers in the discharge of such duties(*v*). Upon whatever ground the distinction is founded, it is one of much importance, and should not be dropped from consideration in the investigation of any case involving the liability of a municipal corporation, for its neglect of duty.

1528 *Liability for torts of officers and agents.*—The rule of law, which holds the employer or superior civilly answerable for the negligence or want

(*p*) Sherbourne *v.* Yuba, 21 Cal. 113.

(*q*) Todd *v.* Birdsall, 1 Cow. 260. Court *v.* Coroner, 2 Wall. 501. Trustees *v.* Tatnam, 13 Ill. 27. Keuren *v.* Johnson, 3 Denio, 183.

(*r*) Denton *v.* Jackson, 2 Johns. Ch. 325. Purdy *v.* People, 4 Hill, 395.

(*s*) Morey *v.* Newfane, 8 Barb. 645. Town of Galen *v.* Clyde, etc., Plank Road Co., 27 Barb. 551.

(*t*) See Soper *v.* Henry County, 26 Iowa, 264; Carroll *v.* Board, 28 Miss. 38; Hedges *v.* Madison County, 1 Gilm. (Ill.) 567.

(*u*) See Bailey *v.* Mayor, etc., of New York, 3 Hill, 531; Crossett *v.* Jaynesville, 28 Wis. 420.

(*v*) Oliver *v.* Worcester, 102 Mass. 489. Detroit *v.* Corey, 9 Mich. 165; 1 Dill. Mun. Corp. s. 39. West Sav. Fund Soc. *v.* Philadelphia, 31 Pa. St. 175. Small *v.* Danville, 51 Me 359. Jones *v.* New Haven, 34 Conn. 1. De Voss *v.* Richmond, 18 Gratt. 338. People *v.* Hurlburt, 24 Mich. 44. See Darlington *v.* Mayor, etc., 31 N. Y. 164.

of skill of his agent or servant, in the course or line of his employment, by which another suffers an injury, applies to municipal corporations. And to render a municipal corporation liable for the tortious acts of its servants and officers, it is enough that it should appear, either that they were expressly authorized by such corporation, or that they were done *bonâ fide*, in pursuance of a general authority to act for the corporation on the subject in relation to which they were performed(*w*). But the injurious acts complained of must be within the scope of the corporate powers as prescribed by charter or positive enactment; otherwise, no liability attaches to the corporation(*x*). Thus, where the officers and agents of a city corporation assumed to build a bridge, the only authority for the performance of the work being an unconstitutional statute, and the bridge fell in consequence of the negligent construction thereof, it was held that the corporation was not liable to an action for damages at the suit of a person injured by the accident(*y*). And where the selectmen of a town caused a dam to be erected, an act which the town had no legal authority to do, and the plaintiff's land was thereby flooded, the town was held not liable for the injury done(*z*). So, where the health officers of a town, without authority of law, took possession of the plaintiff's vessel, and in the process of fumigation, set it on fire, the town was held not liable(*a*). Nor can a municipal corporation be made liable for an act of its agent, by a *ratification* thereof, where the act complained of was of such a nature that the corporation did not possess the power to authorize the doing of it by the agent(*b*).

There are other cases, however, bearing a resemblance to those just mentioned in having a relation to illegal acts, but which arise out of matters within the general powers of the corporation, as to which a corporate liability may exist. Thus, a corporate liability has been asserted for the torts of highway officers in encroaching upon the property of the plaintiff by direction of the governing body of the corporation, under the erroneous supposition that it was part of the street(*c*). So, an action is held to lie against a municipal corporation

(*w*) Lee *v.* Sandy Hill, 40 N. Y. 442. B. & H. Tpk. Co. *v.* City of Buffalo, 56 N. Y. 639.

(*x*) See Harvey *v.* Rochester, 35 Barb. 177; Howell *v.* Buffalo, 15 N. Y. 512; Thayer *v.* Boston, 19 Pick. 511; State *v.* Kirkley, 29 Md. 85; President, etc., of Odell *v.* Schroeder, 58 Ill. 353; Sheldon *v.* Kalamazoo, 24 Mich. 383.

(*y*) Mayor, etc., of Albany *v.* Cunliff, 2 N. Y. 165.

(*z*) Anthony *v.* Adams, 1 Met. (Mass.) 284. See Walling *v.* Shreveport, 5 La. An. 660; Mitchell *v.* Rockland, 52 Maine, 118.

(*a*) Boom *v.* City of Utica, 2 Barb. 104.

(*b*) Lee *v.* Sandy Hill, 40 N. Y. 442. See, also, Crossett *v.* Janesville, 28 Wis. 420; Sheldon *v.* Kalamazoo, 24 Mich. 383.

by the owner of land through which its agents have unlawfully made a sewer(*d*), or for trees destroyed and other injuries done by them(*e*).

A municipal corporation is not *primâ facie* liable for the tortious acts of its officers, though done *colore officii*(*f*); but if such acts, not being wholly *ultra vires*, were done under the authority of the corporation previously conferred, or without special authority, were done by its officers in the scope of their duties and employment, and have subsequently been ratified by it, the corporation is liable(*g*). So, as it regards illegal and void acts, where such acts are within the scope of the objects of incorporation, a municipal corporation may be liable, where the enforcement of such acts by its officers under its authority has been compulsory, resulting in individual injury(*h*). Thus, where an officer of a municipal corporation levied and collected from the plaintiffs the sum imposed upon them by a void assessment, made for a purpose within the general powers of the corporation, and for which the common council had authority to levy an assessment in a regular way, it was held that the corporation was liable to the plaintiffs in an action of tort(*i*).

Municipal corporations are, however, held liable only for the acts of their officers and agents of whom they had the appointment and supervision, and when the duty to be performed was for the benefit of the corporation. They are not liable for the acts of independent officers whose duties are specifically prescribed by law, though appointed by them(*j*). Thus police officers, though appointed by a city, are not its agents or servants in a sense to render it liable for their wrongful or negligent acts in the discharge of their duties. A city is not liable for an arrest made by police officers, which is illegal for want of a warrant(*k*); nor for an assault and battery committed by them, though done in an attempt to enforce a city ordinance(*l*); nor for their un-

(*d*) Hildreth *v.* Lowell, 11 Gray, 345.

(*e*) Walling *v.* Shreveport, 5 La. An. 660. See further illustrations, Soulard *v.* St. Louis, 36 Mo. 546; Thayer *v.* Boston, 19 Pick. 516; McGary *v.* Lafayette, 12 Rob. (La.) 668; *S. C.* id. 674; Wilde *v.* New Orleans, 12 La. An. 15.

(*f*) Boom *v.* City of Utica, 2 Barb. 104.

(*g*) Thayer *v.* Boston, 19 Pick. (Mass.) 511. Wild *v.* New Orleans, 12 La. An. 15. Fox *v.* Northern Liberties, 3 W. & S. (Pa.) 103; 2 Dill. Mun. Corp. § 770. See, also, Bank *v.* Mayor, etc., 43 N. Y. 184; Perley *v.* Georgetown, 7 Gray, 464.

(*h*) 2 Dill. Mun. Corp. § 771.

(*i*) Howell *v.* City of Buffalo, 15 N. Y. 512. And see Bank, etc. *v.* Mayor, etc., 43 ib. 184; Williams *v.* Dunkirk, 3 Lans. (N. Y.) 44; Bennett *v.* Buffalo, 17 N. Y. 383.

(*j*) Mayor, etc., of New York *v.* Bailey, 2 Denio, 433, 447. Maximilian *v.* Mayor, etc., of New York, 2 Hun. 263. Bunkmeyer *v.* Evansville, 29 Ind. 187. Walcott *v.* Swampscott, 1 Allen, 101. Ham *v.* Mayor, etc., 37 N. Y. Superior Ct. 458. Morrison *v.* Lawrence, 98 Mass. 219.

(*k*) Pesterfield *v.* Vickers, 3 Coldw. (Tenn.) 205.

(*l*) Buttrick *v.* Lowell, 1 Allen, 172. Kimball *v.* Boston, ib. 417.

lawful acts of violence in suppressing an unlawful assembly(*m*). So, a city has been held not liable for the act of the recorder in wrongfully refusing bail(*n*); and the liability of a city for the neglect of the board of police commissioners, who are not appointed by, or responsible to, the corporation, has been denied(*nn*). For an injury received by a person while aiding the police officers of a city, at their request, in arresting disturbers of the public peace under a valid ordinance, there is held to be no remedy against the city(*o*).

A municipal corporation is not liable for injuries done by a *fire company*, in the exercise of their functions in extinguishing fires within the city. Such companies are not servants of the city in such a sense as to charge the corporation for their acts. They partake of an official or governmental character analagous to that of the police(*p*). Nor is such a corporation liable to the owner of property destroyed or damaged by fire, in consequence of its neglect to provide suitable engines or fire apparatus, or to provide and keep in repair public cisterns(*q*). So, generally the doctrine of *respondeat superior* does not apply to render a city empowered by the legislature to establish a fire department, liable for losses by fires(*r*). And a city is not liable for the negligence of its officers or agents in executing *sanitary regulations*, adopted for the purpose of preventing the spread of contagious disease, or in taking the care and custody of persons afflicted with such disease, or the houses in which such persons are kept. In executing these legislative functions the city acts as a *quasi* sovereignty, and is not responsible to individuals for the negligence or nonfeasance of its officers or agents(*s*).

As it regards the mistake or want of care or skill of the city *surveyor or engineer*, in the performance of duties for or between *private individuals*, the principle of *respondeat superior* does not apply, and the city is not liable, whether such officer was appointed by it or elected by the people(*t*). But the rule is otherwise when this officer acts for

(*m*) Stewart *v.* New Orleans, 9 La. An. 461. And see Dargan *v.* Mobile, 31 Ala. 469.

(*n*) Pesterfield *v.* Vickers, 3 Coldw. (Tenn.) 205.

(*nn*) Atwater *v.* Baltimore, 31 Md. 462.

(*o*) Sutton *v.* Board of Police, 41 Miss. 236. Cobb *v.* Portland, 55 Me. 381.

(*p*) Jewett *v.* New Haven, 38 Conn. 368. And see Fisher *v.* Boston, 104 Mass. 87; Hayes *v.* City of Oshkosh, 33 Wis. 314; Heller *v.* Sedalia, 53 Mo. 159; Hafford *v.* New Bedford, 16 Gray 297.

(*q*) Grant *v.* Erie, 69 Penn. St. 420; Wheeler *v.* Cincinnati, 19 Ohio St. 19; Patch *v.* Covington, 17 B. Mon. 722.

(*r*) Heller *v.* Mayor, etc., of Sedalia, 53 Mo. 159.

(*s*) Ogg *v.* City of Lansing, 36 Iowa, 495. Richmond *v.* Long's Administrators, 17 Gratt. 375. Murtaugh *v.* St. Louis, 44 Mo. 479. Dargon *v.* Mobile, 31 Ala. 469.

(*t*) Alcorn *v.* Philadelphia, 44 Penn. St. 348.

the corporation, or under its direction, in making *corporate* improvements(*u*).

In New England, surveyors of highways are elected by the town, and are regarded as *public*, rather than *municipal officers*. The town is not therefore held liable in damages for the wrongful acts of the surveyor in the performance of his official duties(*v*). And the surveyor himself is only liable in damages for wanton, malicious, or improper acts in making or repairing the highways in his district(*w*). But in many of the states the repair of streets is treated as a municipal duty, and the officer having charge thereof, as a corporate officer; and where this is the case the doctrine of *respondeat superior* is applicable, and the corporation is held liable for injuries caused by the negligence of such officer in the execution of such authorized corporate improvement or work(*x*). In Connecticut it is held that *constables*, though appointed by the town, are not its agents or servants, and that the town is not liable for their default, the statute not having so provided(*y*). So, in New York, *assessors and collectors* are not in any legal sense the agents of the town, in its corporate capacity, in the assessment and collection of taxes, and the town is not responsible for any mistake or misfeasance by them in the performance of their duty(*z*). Towns are made liable by statute in Vermont, for "default" or "neglect" of *town clerks* in respect to official duties(*a*).

1529 *No liability in respect to exercise of discretionary powers.*—No action for damages lies against a municipal corporation, either for the refusal to exercise, or for the manner in which it exercises, in good faith, discretionary powers of a legislative character(*b*). So, where a municipal corporation is invested with discretionary powers as to the time, place and manner of making corporate improvements, such as the construction of sewers, drains, and vaults, the grading of streets, etc., neither *mandamus* nor a private action will lie against the corporation for an omission or neglect to act(*c*). But for a neglect to repair existing

(*u*) Rochester White Lead Company *v.* Rochester, 3 N. Y. 463. Dayton *v.* Pease, 4 Ohio St. 80. McCarty *v.* Bauer, 3 Kansas, 237.

(*v*) Barney *v.* Lowell, 98 Mass. 570. Judge *v.* Meriden, 38 Conn. 90. Walcott *v.* Swampscott, 1 Allen, 101.

(*w*) Rowe *v.* Addison, 34 N. H. 306.

(*x*) Baker *v.* Boston, 12 Pick. 184. Thayer *v.* Boston, 19 id. 511, See Scott *v.* Mayor, etc., of Manchester, 37 Eng. Law & Eq. 495. *S. C.*, 1 H. & N. 59.

(*y*) Hurlburt *v.* Litchfield, 1 Root, 520.

(*z*) Lorillard *v.* Monroe, 11 N. Y. 392. See Bank *v.* Mayor, 43 id. 184.

(*a*) Hunter *v.* Winsor, 24 Vt. 327; id. 338, 580. And see Jarvis *v.* Barnard, 30 id. 492; Lyman *v.* Edgerton, 29 id. 305.

(*b*) Cole *v.* Medina, 27 Barb. 218. Lacour *v.* Mayor, etc., of N. Y., 3 Duer, 406. White *v.* Yazoo City, 27 Miss. 357; 2 Dill. Mun. Corp. s. 753.

(*c*) Wilson *v.* Mayor, etc., of New York, 1 Denio, 595.

sewers and drains, by which an individual is injured, an action lies(*d*). In the latter case the duty has become purely ministerial and liability attaches(*e*).

A municipal corporation is not responsible for an omission or refusal to enact *ordinances or by-laws*, in the absence of a valid contract creating, or a statute declaring a liability therefor; nor, if it enacts them, is it liable for damages arising from a neglect to enforce them(*f*).

1530 *Property destroyed by mobs.*—At common law a municipal corporation is under no liability to pay for the property of individuals destroyed by mobs or riotous assemblages(*g*); but a statute remedy, in such case, has been provided in many of the states, and the constitutionality of such legislation has been sustained by the courts(*h*). In California it has been held, that persons whose goods are destroyed by a mob, in a riot, are not entitled to recover from the city the value of the goods destroyed, unless, if having knowledge of the impending danger, they use diligence to notify the mayor or the sheriff of the threatened danger to their property; nor are they entitled to recover if they instigate or participate in the riot(*hh*). By statute in New York, it is provided that, "whenever any building or other real or personal property shall be destroyed or injured in consequence of any mob or riot, the city or county in which such property was situated, shall be liable to an action by or in behalf of the party whose property was thus destroyed or injured for the damages sustained by reason thereof"(*i*). Under this statutory provision, a municipal corporation is held liable for the value of property appropriated and carried away by rioters, as well as that destroyed by them(*i*). To render the corporation responsible, it is not necessary that previous notice should have been given, if such notice would have been useless for the purpose of protection(*i*). Nor where the municipal authorities have notice, from other sources, of the existence of an organized mob, and of its threats and attempts to destroy property generally(*i*). Under the statutes of Kansas, it is held that an action against a city, for damages resulting from the kill-

(*d*) Id. Barton *v.* Syracuse, 36 N. Y. 54. Emery *v.* Lowell, 104 Mass. 13.

(*e*) Id. Child *v.* Boston, 4 Allen, 41. McGregor *v.* Boyle, 34 Iowa, 268. See Dermont *v.* Detroit, 4 Mich. 435.

(*f*) Levy *v.* Mayor, etc., of New York, 1 Sandf. *S. C.* 465. Cole *v.* Medina, 27 Barb. 218. Lorillard *v.* Monroe, 11 N. Y. 392. Peek *v.* Austin, 2 Texas, 162.

(*g*) Western College *v.* Cleveland, 12 Ohio St. 375; 2 Dill. Mun. Corp. s. 760.

(*h*) Laws of Maryland, 1835, chap. 137; Laws of N. H., 1854, chap. 1519. See Darlington *v.* Mayor, etc., of New York, 31 N. Y. 164; Lowell *v.* Wyman, 12 Cush. 273; *In re* Penna. Hall, 5 Pa. St. 204.

(*hh*) Wing Chung *v.* Los Angelos, 47 Cal. 531.

(*i*) Laws of 1855, chap. 428, s. 1. Sarles *v.* New York, 47 Barb. 447. Schiellein *v.* Supervisors of Kings, 43 id. 490. Newberry *v.* New York, 1 Sweeny, 389.

ing of a man by a mob, should be brought in the name of the personal representative of the deceased(*ii*).

1531 *Buildings destroyed to prevent fire.*—In a case of necessity, to prevent the spreading of a fire, any individual or municipal officer may demolish a building in a block or street, without being responsible in trespass or otherwise. This is one of the many cases where the maxim applies, *salus populi suprema est lex.* The ground of exemption from liability in such case is the *public necessity*, and if this did not require the act to be done, the actors would be responsible(*j*). Statutes authorizing the destruction of buildings, in order to prevent the spread of a conflagration, are founded upon, and are mere regulations of, the common-law right just stated. They merely appoint a municipal agent to judge of the emergency, and direct the performance of acts which any individual might do at his peril, without any statute at all(*jj*). In some cases municipal corporations are made liable by statute, or charter, for damages suffered by individuals in the destruction of buildings or property, under the direction of the proper officers, to check the spread of a conflagration; but the liability, being purely statutory, will not attach unless the case is clearly and fairly within the enactment(*k*). Thus, where such a recovery is allowed by the statute only in case of the destruction of a building by the order of three fire wards, or directors, a destruction of it by the order or direction of one of these officers creates no liability against the corporation, and a by-law, which authorized one to exercise, in urgent cases, the powers of the three, was adjudged void(*kk*). So the remedy pointed out by the statute creating the liability against the corporation, can only be pursued. If an assessment is provided for by the statute, a civil action will not lie(*l*); but if no specific remedy is given, then an action may be brought(*m*).

1532 *Not liable for consequential damages.*—In the absence of a statute

(*ii*) Atchison *v.* Twine, Supreme Court, Kansas, 1872. See generally, on this subject, the following cases: Fanvial *v.* New Orleans, 20 La. An. 410; Williams *v.* New Orleans, 23 id. 507; Chadbourne *v.* New Castle, 48 N. H. 196; Underhill *v.* Manchester, 45 id. 214; Newberry *v.* New York, 1 Sweeny, 369.

(*j*) See Mouse's case, 12 Co. 63; Respublica *v.* Sparhawk, 1 Dallas, 337; Taylor *v.* Plymouth, 8 Metc. 462; Mayor, etc., of N. Y. *v.* Lord, 18 Wend. 126; Aff'g *S. C.* 17 id. 285; American Print Works, 3 Zabr. 590; id. 9; 1 id. 248; id. 714.

(*jj*) People *v.* Winnehammer, 12 How. (N. Y.) 260; id. 274. *S. C.* 13 N. Y. 378. Russell *v.* Mayor of New York, 2 Denio, 461.

(*k*) Western College *v.* Cleveland, 12 Ohio St. 375. Fisher *v.* Boston, 104 Mass. 87. Taylor *v.* Plymouth, 8 Met. 462. Sarocco *v.* Geary, 3 Cal. 69. Hafford *v.* New Bedford, 16 Gray, 297.

(*kk*) Coffin *v.* Nantucket, 5 Cush. 269. 2 Dill. Mun. Corp. § 757.

(*l*) Russell *v.* Mayor, etc., of N. Y., 2 Denio, 461.

(*m*) Lowell *v.* Wyman, 12 Cush. 273.

creating a liability therefor, an action will not lie against a municipal corporation for consequential damages either to private property or persons, where the act complained of was done by the corporation or its officers under and pursuant to authority conferred by a valid act of the legislature, and there was no want of care or skill in the execution of the power(*n*). Thus, where a municipal corporation, under a rightful authority contained in its charter, grades and levels a street, no action will lie by an adjoining owner whose lands are not actually taken, for consequential damages to his premises, there being no want of care or skill in the execution of the work, and no provision in the charter for the payment of damages of that kind(*o*). Such is the settled doctrine of the courts in most of the states, but in Ohio a different doctrine prevails. By the decisions of the court in that state municipal corporations are held liable for consequential injuries which result from the exercise of their lawful powers, though these powers be exercised judiciously, without malice, and without illegality; the court proceeding upon the ground that if an act, as digging a drain, or cutting down a street, though legal, and legally executed, be done for the good of all to the injury of an individual, the injury should, in justice and good morals, be shared by all(*p*).

Where the corporation does not exceed its power, there is no liability to the adjacent owner for grading the whole width, and so close to his line as to cause his earth or fences and improvements to fall, and the corporation is not bound to furnish supports or build a wall to protect it(*q*). And the courts will not inquire whether the grade adopted be the best one, or whether one causing less damage would not equally have answered the purpose intended(*r*).

Private property cannot be taken for public use without making just compensation to the owner; and a law which authorizes the taking without providing for compensation must be unconstitutional and void. But laws which authorize the opening and improving of streets and highways, or the construction of other works of a public

(*n*) Radcliff's Executors *v.* Mayor, etc., of Brooklyn, 4 N. Y. 195. Allentown *v.* Kramer, 73 Pa. St. 406. Callender *v.* Marsh, 1 Pick. 418. Alexander *v.* Milwaukee, 16 Wis. 247.

(*o*) Radcliff's Executors *v.* Mayor, etc., of Brooklyn, 4 N. Y. 195. And see Benedict *v.* Goit, 3 Barb. 459; Graves *v.* Otis, 2 Hill, 466; Hovey *v.* Mayo, 43 Me. 322; Smith *v.* Washington, 20 How. (U. S.) 135.

(*p*) McCombs *v.* Akron, 15 Ohio, 474; S. C. 18 id. 229. Rhodes *v.* Cincinnati, 10 id. 159. Crawford *v.* Village of Delaware, 7 Ohio St. 459. See Alexander *v.* Milwaukee, 16 Wis. 247; Eaton *v.* The R. R. Co., 51, N. H. 504.

(*q*) Rome *v.* Omberg, 28 Ga. 46. Taylor *v.* St. Louis, 14 Mo. 20. St. Louis *v.* Gurno, 12 id. 414. Roll *v* Augusta, 34 Geo. 326. But see Mears *v.* Wilmington, 9 Ired. 83.

(*r*) Snyder *v.* Rockport, 6 Ind. 237. Boberts *v.* Chicago, 26 Ill. 249. Reynolds *v.* Shreveport, 13 La. An. 426.

nature, have never been held void because they omitted to provide compensation for those who, though their property was not taken, suffered indirect or consequential damages. The loss which they sustain has always been regarded as *damnum absque injuria*(*s*). The adjoining property, though injured, is not, in a constitutional sense, taken for public use(*t*). If the statute in such case provides a specific remedy, or a remedy otherwise than by a civil action, such remedy can alone be pursued(*u*).

1533 *Liability for defective streets and sidewalks.*—In the United States *quasi* corporations, such as counties and townships, and the *towns* of New England, are held to be under no common-law obligation to repair highways, streets or bridges within their limits; and for damages caused by the neglect to perform this duty, even when the duty is enjoined by the legislature, it is held that no action lies unless it be expressly given by statute(*v*). But it is otherwise as respects cities or ordinary municipal corporations proper; and it is held that where the streets are, by the charter, under the control of the city authorities, it is incumbent on the city to keep them in repair, and for any neglect in its performance, the city is liable in damages(*w*). So, by *statute* in each of the New England States, a liability has been imposed upon *towns* for a neglect to keep their highways in repair, and for an injury received by a person through such neglect, an action lies against the town. Thus, by a statutory provision in Massachusetts, "all highways, townways, causeways and bridges within the bounds of any town," are required to "be kept in repair at the expense of such town, so that the same may be safe and convenient for travellers, with their horses, teams and carriages, at all seasons of the year"(*x*). And it is further provided that "if any person shall receive any injury in his person or property by reason of any defect or want of repair, which has existed for the space of twenty-four hours in any highway," he may recover compensation therefor.

(*s*) Thurston *v.* Hancock, 12 Mass. 220. Callender *v.* Marsh, 1 Pick. 418. Radcliff *v.* Mayor, etc., of Brooklyn, 4 N. Y. 195.

(*t*) Eaton *v.* Railroad Company, 51 N. H. 504; 2 Dill. Mun. Corp. § 784.

(*u*) Revek *v.* Newark, 33 N. J. Law, 129. Hovey *v.* Mayo, 43 Me. 322. Cole *v.* Muscatine, 14 Iowa, 296.

(*v*) Larkin *v.* Saginaw County, 11 Mich. 88. Pray *v.* Jersey City, 32 N. J. Law, 394. Sutton *v.* Board, 41 Miss. 236. White *v.* County of Bond, 58 Ill. 297. Town of Waltham *v.* Kemper, 55 id. 346. Detroit *v.* Blakely, 21 Mich. 84.

(*w*) Sterling *v.* Thomas, 60 Ill. 284. Browning *v.* Springfield, 17 id. 143. Mechanicsburg *v.* Meredith, 54 id. 84. In California incorporated cities are not liable for injuries from unsafe condition of streets, unless made liable by charter. Winbigler *v.* Los Angelos, 45 Cal. 36.

(*x*) Rev. Stat. ch. 25, s. 1. Id., s. 22. And see Stat. of 1850, ch. 5; Gen. Stat. 1860, ch. 44; Stanton *v.* Springfield, 12 Allen, 566.

Similar statutory provisions have been enacted in the other New England states(*z*). And agreeably to the decisions of the courts of New England, there is no implied liability, either upon towns or cities, for injuries resulting from defective streets or sidewalks; the liability is wholly statutory(*a*). And it does not extend to persons not within the protection of the statute. Thus, under the Massachusetts statute the duty is only towards travellers, and does not embrace the case of a person who is using the highway solely for the purposes of play(*b*). So, the defect in the highway or street must be the direct and proximate cause of the special damage for which the statute gives an action(*c*). The following decisions under the new England statutes may prove instructive. In places where rails or barriers are necessary for the proper security of travellers, the authorities charged with the duty of keeping the roads in repair and safe condition must furnish them(*d*). But towns are not bound to fence or erect barriers to prevent travellers from getting outside of the way when there is no unsafe place immediately contiguous(*e*). Nor are they liable for obstructions in portions of the highway, not part of the travelled path, and not so connected with it that they will affect the security or convenience for travel of those using the travelled path(*f*). The Massachusetts doctrine is, that the damage, in order to be actionable, must be occasioned by causes entirely within the highway(*g*). The liability of a town or city for actionable defects is held to extend to sidewalks, they being deemed a part of the street(*h*). Under the statutory provision requiring highways to be made "safe and convenient at all seasons," etc., the decisions hold that towns and cities are liable for

(*z*) As to Rhode Island, see Providence *v.* Clapp, 17 How. 161; New Hampshire Rev. Stat. ch. 47, s. 1; Maine Rev. Stat. of 1841, ch. 25.

(*a*) Oliver *v.* Worcester, 102 Mass. 489. Chisey *v.* Canton, 17 Conn. 475. Reed *v.* Belfast, 20 Me. 248. State *v.* Burlington, 36 Vt. 521; 2 Dill. Mun. Corp. 908.

(*b*) Blodgett *v.* Boston, 8 Allen, 237. Higginson *v.* Nahant, 11 id. 530. See Kitredge *v.* Milwaukee, 30 Wis. 365. Britton *v.* Cummington, 107 Mass. 347. Stinson *v.* Gardiner, 42 Me. 248.

(*c*) Sears *v.* Dennis, 105 Mass. 310. Adams *v.* Carlisle, 21 Pick. 146. Loan *v.* Boston, 106 Mass. 450.

(*d*) Commonwealth *v.* Wilmington, 105 Mass. 599. Palmer *v.* Andover, 2 Cush. 600. Rowell *v.* Lowell, 7 Gray, 100.

(*e*) Murphy *v.* Gloucester, 105 Mass. 470. Sparhawk *v.* Salem, 1 Allen, 30. See Chicago *v.* Gallagher, 44 Ill. 295; Nebraska City *v.* Campbell, 2 Black, 590.

(*f*) Smith *v.* Wendell, 7 Cush. 498. Kellogg *v.* Northampton, 4 Gray, 65. *S. C.* 8 id. 504. Wheeler *v.* Westport, 30 Wis. 329.

(*g*) Richards *v.* Enfield, 13 Gray, 344. And see Keith *v.* Easton, 2 Allen, 552; Baltimore *v.* Brauman, 14 Md. 227.

(*h*) Lowell *v.* Spaulding, 4 Cush. 275. Bacon *v.* Boston, 3 id. 174. Manchester *v.* Hartford, 30 Conn. 118. Hubbard *v.* Concord, 35 N. H. 52. Palmer *v.* Portsmouth, 43 id. 265. Cusick *v.* Norwich, 40 Conn. 375. Boston *v.* Springfield, 110 Mass. 131. As to actionable surface inequalities, see Loan *v.* Boston, 106 Mass. 450; Hubbard *v.* Concord, 35 N. H. 52; Lacon *v.* Page, 48 Ill. 499; Raymond *v.* Lowell, 6 Cush. 524.

defects and obstructions caused by *snow and ice* rendering them unsafe, though the tendency of the later decisions is, to restrict this liability(*hh*). The liability being one of statutory creation, cannot be enlarged by the courts beyond the scope and intention of the statute(*i*). A sidewalk within a city may become unsafe from accumulated ice and snow, and yet the city be not liable in damages for injuries sustained by persons falling thereon. Thus, if the ice and snow collected on the sidewalk merely presents a smooth slippery surface, without any accumulation in heaps sufficient to prevent a person, using due care, from walking without falling, the city will not be liable for injuries arising from a fall upon the ice, as this is not such a neglect to keep the streets in repair as will create a liability on the part of the corporation(*j*). So, if the person injured both saw and was warned against the ice, and yet failed to avoid it, the city will not be liable(*k*). But where the city has allowed ice to accumulate on a sidewalk, and to remain there long enough to warrant a jury to attribute negligence to the city, and the ice was at the time of the injury concealed by snow, the city will be held liable.(*l*). To such cases the doctrine of contributory negligence will not apply(*m*). If the usually travelled path of a highway is obstructed with snow, and the only way broken out is at the side over a frozen ditch, the town is held liable for defects in such way. And the occurrence of a rain and a thaw is sufficient notice to the town of its unsafe condition(*n*). As a general rule, where ice and snow are suffered to remain upon a sidewalk, in such an uneven and rounded form, that a person cannot walk over it, using due care, without danger of falling down, this constitutes a defect for which the city or town will be liable(*o*). So it has been held that a jury may find that holes caused by the sinking of stones below the surface, through the action of *frost*, are defects for which the town is liable(*p*).

(*hh*) See Stanton *v.* Springfield, 12 Allen, 566; Stone *v.* Hubbardston, 100 Mass. 49; Loker *v.* Brookline, 13 Pick. 343; Gerald *v.* Boston, 108 Mass. 580; Morse *v.* Boston, 109 Mass. 446.

(*i*) Taylor *v.* Peckham, 8 R. I. 349.

(*j*) Cook *v.* City of Milwaukee, 24 Wis. 270. *S. C.* 27 id. 191. Stanton *v.* Springfield, 12 Allen, 566. Hutchins *v.* City of Boston, 97 Mass. 272.

(*k*) Durkin *v.* City of Troy, 61 Barb. 437.

(*l*) Mosey *v.* City of Troy, 61 id. 580.

(*m*) Clark *v.* City of Lockport, 49 id. 580.

(*n*) Savage *v.* Bangor, 40 Me. 176.

(*o*) Cook *v.* City of Milwaukee, 24 Wis. 270. Luther *v.* City of Worcester, 97 Mass. 268. Hutchins *v.* City of Boston, id. 272. And see Hull *v.* Lowell, 10 Cush. 260; Shea *v.* Lowell, 3 Allen, 136; McLaughlin *v.* City of Corry, 77 Pa. St. 97; Payne *v.* Lowell, 10 id. 147; Providence *v.* Clapp, 17 How. (U. S.) 164.

(*p*) Tripp *v.* Lyman, 37 Me. 250.

Cities and towns are under no obligation to light their highways or streets(*q*); but are liable for the want of proper *guards or lights*, placed at points where the ways are repairing(*r*). Under the statute of Massachusetts, a city is held liable for injuries caused by defective *awnings* projected over the sidewalk, and supported by posts at the curbstone(*s*). But for an injury received from the fall of snow and ice projecting from the roof of a building and overhanging the sidewalk, the city or town is not liable(*t*). Nor is the city liable for injuries sustained by a traveller on a highway, from the falling upon him of some object from the adjacent building, as a sign insecurely fastened(*u*); or of an iron weight attached to a flag suspended by third persons across a street(*v*). The awning differs from the overhanging sign or ice, in that it is not a mere incident or attachment of the building alone, but is a structure erected with reference, in part at least, to the use of the sidewalk as such. The structure itself, being adapted to the sidewalk, in some measure, as a part of its construction and arrangement, for use as a sidewalk, a danger from its insecure condition may reasonably be treated as arising from a defective or unsafe condition of the sidewalk. Permitting it to remain will make the city or town responsible for it, as much as if it were originally placed there by its own officers(*w*). Such would seem to be the ground for the distinction as to liability in the above cases. In *New Jersey*, it is held, that a neglect to repair streets by municipal corporations proper, will not give a private remedy without an express statute(*x*). So, in *Pennsylvania*, the duty and liability as to keeping highways and bridges in repair is statutory(*y*). In *Maryland*, *counties* are held liable, without an express statute, to a private action for injuries sustained from defects in roads(*z*).

In *New York*, it is conclusively established that a municipal corporation is liable to one sustaining injury by reason of its neglect to

(*q*) Randall *v.* Railroad Company, 106 Mass. 276.

(*r*) Kimball *v.* Bath, 38 Me. 219. Grant *v.* Brooklyn, 41 Barb. 381. Storrs *v.* Utica, 17 N. Y. 104. See Worster *v.* Canal, etc., 16 Pick. 541.

(*s*) Drake *v.* Lowell, 13 Met. 292. Day *v.* Milford, 5 Allen, 98. See Keith *v.* Easton, 2 Allen, 552; Barber *v.* Roxborough, 11 id. 318; Hume *v.* City of New York, 47 N. Y. 639.

(*t*) Hixon *v.* Lowell, 13 Gray, 59, 62.

(*u*) Taylor *v.* Peckham, 8 R. I. 349. Jones *v.* Boston, 104 Mass. 75.

(*v*) Huvison *v.* New Haven, 36 Conn. 136.

(*w*) Jones *v.* Boston, 104 Mass. 75.

(*x*) Pray *v.* Jersey City, 32 N. J. 394. See Freeholders *v.* Strader, 3 Harr. (N. J.) 108; Detroit *v.* Blakeby, 21 Mich. 84.

(*y*) Rapho *v.* Moore, 68 Pa. St. 404.

(*z*) County Commissioners *v.* Gibson, 36 Md. 229. County Commissioners *v.* Duckett, 20 id. 468. As to the liability of *counties* in Missouri for defective bridges, see Soper *v.* Henry Co., 26 Iowa, 264; Brown *v.* Jefferson County, 16 id. 339.

keep its streets in a safe condition, and that a sidewalk is part of the street(*a*). The general doctrine is stated to be, that where power is conferred on public officers or a municipal corporation to make improvements, such as streets, sewers, etc., and keep them in repair, the duty to make them is *quasi* judicial or discretionary, involving a determination as to their necessity, requisite capacity, location, etc., and for a failure to exercise this power, or an erroneous estimate of the public needs, no civil action is maintainable(*b*). But when this discretion has been exercised, and the street, sewer or other improvement has been made, the duty to keep it in repair so as to prevent it from being dangerous to the public, is ministerial, and for a negligent omission to perform this duty, an action lies by the party injured(*c*). And although a municipal corporation, by ordinance, impose upon the lot-owners the duty of keeping the sidewalks in repair, it does not thereby relieve itself from the duty imposed by law(*d*). It cannot avoid its responsibility by an arrangement with a third party, delegating this duty to the latter(*e*). And where it undertakes to keep streets in repair, though the duty of so doing is not incumbent upon the corporation, it must not make the repairs in a manner indifferent to the personal safety of those who travel the streets(*f*).

The general rule is laid down, that a municipal corporation is liable for an injury caused by a defect in a public street, only where the corporation has had *notice of the defect*, and is guilty of some neglect of duty(*g*). The notice may be actual, or may be inferred from the circumstances of the case. Thus, if the defect is a dangerous, palpable one, in a public place, and if it has long existed, knowledge on the part of the corporation may be presumed(*h*). In a recent case in New York, Folger, J., in giving the opinion of the court of appeals, says: "We should not hold that a municipal corporation is liable for an injury resulting from a defect in a public way, when such defect

(*a*) Wilson *v.* City of Watertown, 5 Pars. (N. Y.) 579; *S. C.* 3 Hun, 508. Hutson *v.* Mayor of New York, 9 N. Y. 163. Conrad *v.* Trustees of Ithaca, 16 N. Y. 158. West *v.* Brockport, id. 161. Congreve *v.* Smith, 18 id. 79. Davenport *v.* Ruckman, 37 id. 568.

(*b*) Mills *v.* City of Brooklyn, 32 N. Y. 489. Hines *v.* City of Lockport, 50 N. Y. 236.

(*c*) Requa *v.* City of Rochester, 45 N. Y. 129. Hines *v.* Lockport, 50 id. 236. McCarthy *v.* City of Syracuse, 46 N. Y. 194. See City of Henderson *v.* Sandefor, 1 N. Y. Weekly Dig. 380.

(*d*) Reinhard *v.* New York, 2 Daly, 243. Wallace *v.* New York, 2 Hilt. 440; *S. C.* 18 How. 169. Clemence *v.* City of Auburn, 6 Sup. Ct. R. 633.

(*e*) Blake *v.* St. Louis, 40 Mo. 569. Springfield *v.* LeClaire, 49 Ill. 476.

(*f*) McDonough *v.* Virginia City, 6 Nev. 90.

(*g*) Bill *v.* Norrick, 39 Conn. 223. Bassett *v.* City of St. Joseph, 53 Mo. 290. Hull *v.* City of Kansas, 54 id. 598. Dewey *v.* Detroit, 15 Mich. 307.

(*h*) See Norristown *v.* Moyer, 67 Pa. St. 355; Rapho *v.* Moore, 68 id. 404; Dorlan *v.* Brooklyn, 46 Barb. 504; Hume *v.* Mayor, etc., of New York, 47 N. Y. 639; Cleveland *v.* St. Paul, 18 Minn. 279; Moore *v.* Minneapolis, 19 Minn. 300.

is from the wilful act of some person without authority, and the injury has followed close upon the unauthorized act. But if between the doing of the wilful act and the befalling of the injury, there has elapsed such length of time as that the defect in the way has become known and notorious, and there has been full opportunity for the municipality, through its agents charged with that duty, to learn the existence of the defect, we are of the opinion that it is as much the neglect of the municipality not to have amended the defective way, as though the way had fallen from repair by ordinary wear and tear, or other natural cause. Should there be a violent rain storm in the night time, and by the choking of sewers, theretofore and under reasonably anticipated circumstances sufficient to carry off the fallen water, a torrent be turned across a street, and it washed out, to such state as that injury occurred to some one abroad on his travel, before the working hours had come again in which the damage could be repaired or warned against, we should not hold a municipality liable for that injury"(*i*). Notice to a citizen is not, necessarily, notice to the municipal authorities, but if many citizens had knowledge of the defect, so that it became notorious, that fact furnishes strong evidence of knowledge of the defect on the part of the corporation(*j*). So, it has been held in a recent case in the House of Lords, that having the means of knowledge, and negligently remaining ignorant, is equivalent in creating a liability to *actual* knowledge(*k*).

1534 *Liability as respects drains and sewers.*—Ordinarily a municipal corporation is not liable for consequential injuries to private property resulting from the improvement of its streets, as for example, the construction of a sewer, if in making such improvements reasonable care and skill be used(*l*). Nor is it responsible in a private action for not providing sufficient sewerage for every or any part of a city or village. The entire omission to construct a sewer, or the failure to make it of sufficient size, has been held not to create a liability on the part of the city, for the reason that the duty of determining where sewers

(*i*) Requa *v.* City of Rochester, 45 N. Y. 129, 135, citing State *v.* Freyburg, 3 Shep. (Me.) 405. People *v.* H. & C. T. R. Co., 23 Wend. 254. And see Hume *v.* Mayor, etc., of New York, 47 N. Y. 639; Mayor *v.* Sheffield, 4 Wall. (U. S.) 189, 195, 196; Cooley *v.* Westbrook, 57 Me. 81; Hunt *v.* Brooklyn, 35 Barb. 226; Griffin *v.* Mayor, etc., of New York, 9 N. Y. 456; Reed *v.* Northfield, 13 Pick. 94-98.

(*j*) See id.; Bill *v.* Norrick, 39 Conn. 223.

(*k*) Mersey Docks *v.* Gibbs, 11 H. L. Cas. 687. *S. C.* Law R. 1 H. L. 93 And see Weisenberg *v.* Appleton, 26 Wis. 56; Chicago *v.* Johnson, 53 Ill. 91; Barton *v.* Syracuse, 36 N. Y. 54; McCarthy *v.* Syracuse, 46 id. 194.

(*l*) Indianapolis *v.* Huffner, 30 Ind. 235. Carr *v.* Northern Liberties, 35 Pa. St. 324. City Council *v.* Gilmer, 33 Ala. 116.

shall be located and their dimensions, is in its nature judicial(*m*). But where a sewer has been determined upon and is constructed, all the authorities agree that the duties of constructing it properly and keeping it in good condition and repair are ministerial; and that negligence in the performance of those duties will render the city liable for damages resulting therefrom(*n*). In the construction of a sewer, it is incumbent upon the corporation to use reasonable care and skill to avoid injuries to the person or property of others; and this care and skill relates as well to the capacity of the sewer as to the mere mechanism of its construction(*o*). If a private person is injured by the bursting of a sewer by reason of its imperfect or insufficient construction, the corporation are clearly liable, although it was under no obligation to provide any sewer whatever(*p*). So, if on account of its insufficient outlet a sewer becomes choked with *debris*, and the water in consequence thereof flows back into the cellar of an adjoining proprietor, the city will be liable for the resulting damages(*q*). But if the overflow had been occasioned by the obstruction of the sewer by sand washed in by heavy rains immediately preceding, and not by any defect in the sewer, the city would not have been liable(*r*). A property owner, in connecting his drain with a public sewer, is under no obligation to guard against the negligence of the corporation and its want of care in keeping the sewer in repair(*s*); but in the absence of any want of proper care, upon the part of its officers, the corporation is not responsible for the negligence of those employed by the lot-owner to do the work(*t*).

A municipal corporation cannot lawfully discharge its sewers on *private property*, or into small watercourses flowing through private property, thereby increasing the natural flow of the watercourse to the damage of the property owner(*u*). Nor can the corporation lawfully discharge its sewers into a mill-race owned by others(*v*). And if it introduce within its limits water for manufacturing purposes and turn

(*m*) Mills *v.* City of Brooklyn, 32 N. Y. 489. McCarthy *v.* Syracuse, 46 id. 194.

(*n*) Id. Emery *v.* Lowell, 104 Mass. 13. McGregor *v.* Boyle, 34 Iowa, 268. Laventhal *v.* New York, 5 Lans. 532. Child *v.* Boston, 4 Allen, 41. Barton *v.* Syracuse, 36 N. Y. 54. See Donohue *v.* New York, 3 Daly (N. Y.), 165; Amy *v.* Supervisors, 1 Wall. 136.

(*o*) Indianapolis *v.* Huffner, 30 Ind. 235.

(*p*) Laventhal *v.* Mayor, etc., of New York, 5 Lans. 532. Leavenworth *v.* Casey, McCahon (Kans.), 124.

(*q*) Nims *v.* Mayor, etc., of Troy, 3 N. Y. Sup. Ct. 5.

(*r*) Smith *v.* Mayor, etc., of New York, 4 Hun, 637.

(*s*) Barton *v.* Syracuse, 36 N. Y. 54. See Wendell *v.* Troy, 4 Keyes (N. Y.), 261.

(*t*) Masterton *v.* Village of Mount Vernon, 58 N. Y. 391.

(*u*) O'Brien *v.* St. Paul, 18 Minn. 176.

(*v*) Columbus *v.* Woolen Co., 33 Ind. 435.

the same into its drains, causing an increased flow of water upon adjoining lands, the city will be liable for the resulting damages(*w*). After a city has constructed a sewer or drain for the purpose of carrying off surface water, it may, in its discretion, wholly abandon and discontinue the same, and if individuals are not left in any worse condition by such abandonment or discontinuance than they would be if such sewer or drain had never been made, the city will not be liable for any injury to individuals caused by the flow of surface water(*x*).

1535 *Liability as to watercourses and surface water.*—As has been previously stated, a city is not liable for a neglect to construct gutters, drains or sewers to carry off the surface water falling or collecting within its limits, so as to prevent it from flowing upon adjoining lots(*y*). Nor for abandoning such gutters, drains or sewers when constructed(*z*). So, a city is not liable for the collection of water in ponds or pools on adjoining lots, occasioned by the filling up of streets and crossings to the established grade(*a*).

1536 *Liability for nuisances maintained on property of.*—A municipal corporation has no more right to maintain a nuisance than an individual would have, and for a nuisance maintained upon its property, the same liability attaches against a city, as to an individual(*b*). So, while a municipal corporation may, by an ordinance, make provision for the prevention and removal of a nuisance, yet it has no authority to license a nuisance(*c*). For the maintenance of a public nuisance, a municipal corporation renders itself not only liable to indictment, but also to an action for damages at the suit of any individual sustaining special damages therefrom(*d*). Any continuous obstruction of a public highway or street, not authorized by competent legal authority, is a public nuisance(*e*). Thus, a city was held liable for a nuisance in using a part of a public street for the erection of sheds to be occupied

(*w*) Phinizy *v.* City Council of Augusta, 47 Ga. 260.

(*x*) City of Atchison *v.* Challis, 9 Kan. 603. And see Simpson v. Keokuk, 34 Iowa, 568.

(*y*) Wilson *v.* Mayor of New York, 1 Denio, 575.

(*z*) City of Atchison *v.* Challis, 9 Kan. 603. Simpson *v.* Keokuk, 34 Iowa, 568.

(*a*) Bangor *v.* Lansil, 51 Me. 521. Flagg *v.* Worcester, 13 Gray, 601. Weeks *v.* Milwaukee, 10 Wis. 242. Hudson *v.* Hoyt, 27 id. 656. Clark *v.* Wilmington, 5 Harring. (Del.) 243. Imler *v.* City of Springfield, 55 Mo. 119. But see Aurora *v.* Reed, 57 Ill. 29.

(*b*) Donahue *v.* New York, 4 Daly, 65. Harper *v.* Milwaukee, 30 Wis. 365. Brower *v.* Mayor of New York, 3 Barb. 254. Dorman *v.* Jacksonville, 13 Fla. 538.

(*c*) Adm'r of Chambers *v.* Ohio Life and Trust Insurance Co., 1 Disney, 327. Ryan *v.* Capes, 11 Rich. (S. C.), 217. Pfau *v.* Reynolds, 53 Ill. 212. Columbus *v.* Jacques, 30 Geo. 506. Com. *v.* Rush, 14 Pa. St. 186.

(*d*) People *v.* Albany, 11 Wend. 539. Hunt *v.* Mayor of Albany, 9 id. 571. Thayer *v.* Boston, 19 Pick. 291. Doolittle *v.* Supervisors, 18 N. Y. 155. St. John *v.* The Mayor, 3 Bosw. (N. Y.) 483.

(*e*) Davis *v.* Mayor, etc., of New York, 1 Duer, 451; 9 N. Y. 263.

as market places(*f*). So, openings made and left in streets or sidewalks are nuisance. And a structure, such as the cornice of a building, projecting over a street in a city in such a manner as to be dangerous to passers-by, is a nuisance which the corporate authorities may abate, and if they fail so to do, after notice of its dangerous character, the city will be liable to any one injured thereby(*h*). But for a nuisance resulting from defects in a public school building, the city of New York was held not liable(*i*); nor is it liable for a defect in the lateral service-pipes connected with the main water-pipes from the Croton aqueduct(*j*). Generally, a municipal corporation will be held liable for all injuries resulting from a failure on its part to keep its streets, lanes and walks free from obstructions, such as steps, fences, posts or other nuisances existing therein; and the fact that these nuisances are upon private property, is no excuse for its failure to remove them, nor does it constitute a defence to an action for injuries resulting from its neglect(*k*).

1537 *Liability for obstructions to navigation.*—Under an act of the legislature of Pennsylvania(*l*), requiring the city of Philadelphia to keep the navigable waters within the city free from obstructions, the city was held liable for losses occurring on account of obstructions to navigation not being removed in reasonable time(*m*). But where a city corporation had, among other powers, express authority "to remove all obstructions in the harbor," it was held not liable to a party who received damages from a sunken hulk therein, if the city had never undertaken to exercise the power granted to it to clear out the harbor(*n*). If, however, the city had entered upon the work of removing the hulk, and in doing so had carelessly left it in an exposed situation, by reason of which a navigator's vessel was injured, it would be liable for such negligence(*o*).

1538 *Miscellaneous liabilities.—Where railroad companies* have been authorized by law to construct their roads over public highways and streets, and a person suffers damage from a defective highway or street thus

(*f*) St. John *v.* Mayor of New York, 3 Bosw. 483. Scammon v. Chicago, 25 Ill. 424. Beatty *v.* Gillmore, 16 Pa. St. 463. Runyon *v.* Bordine, 2 Green (N. J.), 472.

(*h*) Grove *v.* City of Fort Wayne, 45 Ind. 429.

(*i*) Terry *v.* New York, 8 Bosw. 504.

(*j*) Id.

(*k*) Parker *v.* Macon, 39 Ga. 725. And see Wilson *v.* City of New Bedford, 108 Mass. 261; Gilmartin *v.* Philadelphia, 71 Pa. St. 140; Thurston *v.* City of St. Joseph, 51 Mo. 510; Oliver *v.* Worcester, 102 Mass. 490; Barton *v.* Springfield, 110 id. 131; Morse *v.* Boston, 109 id. 446.

(*l*) Act of 1854, s. 28.

(*m*) Winpenny *v.* Philadelphia, 65 Pa. St. 135. See Seaman *v.* New York, 3 Daly (N. Y.), 147.

(*n*) Goodrich *v.* Chicago, 20 Ill. 445. 2 Dill. Mun. Corp. 862, n.

(*o*) Goodrich *v.* Chicago, *supra*.

occasioned, the town or city is held primarily responsible by the course of decision in the New England states(*p*); thus compelling it, when held liable, to seek indemnity from the railroad company(*q*). But a town in Massachusetts is not held responsible for injuries sustained by a traveller on a highway, caused merely by the running of the cars of a railroad company across the highway(*r*); nor by reason of a telegraph post being erected within the limits of the highway, by legal sanction(*s*). If, however, such posts be erected within the limits of a street or highway without such sanction, they are nuisances(*t*).

Where a proprietor upon a city street, while making a sidewalk in front of his premises under an order of the city authorities, negligently left the walk in such a condition as to be dangerous to public travel, and the plaintiff was injured by reason of it; and where a reasonable supervision on the part of the city authorities would have discovered the condition of the walk in season to have prevented the injury, the city is liable. It is the duty of a city to supervise work done by the proprietor, and to use, or see used, suitable precautions to prevent accidents. The rule that a city must have notice, actual or implied, of a defect in a public way, before it can be held liable for an injury caused by the defect, has no application to a case where the ignorance of the defect is the result of a clear and unmistakable omission. Ignorance in such a case is itself negligence(*u*). And a city is held liable for injury received by one falling over an abrupt descent from the sidewalk, in the absence of negligence on his part, where it has notice of the dangerous condition of the sidewalk, nothwithstanding the latter had been so constructed without authority from the city(*v*).

Where the water of a stream which a riparian proprietor has been in the habit of using in his business, has become polluted by the emptying into it of city sewers, he cannot recover against the city for the pollution, so far as it is attributable to the plan of sewerage adopted by the city, but he can recover for it so far as it is attributable

(*p*) See Barber *v.* Essex, 27 Vt. 62; Phillips *v.* Veazie, 40 Me. 96; Currier *v.* Lowell, 16 Pick. 170; 2 Dill. Mun. Corp. 929, and note. And see Goff *v.* Hutchinson, 88 Ind. 341; Wilson *v.* City of Watertown, 5 Pars. (N. Y.) 579; City of Brooklyn *v.* Brooklyn City R. R. Co., 47 N. Y. 476.

(*q*) Batty *v.* Duxbury, 24 Vt. 155. Willard *v.* Newbury, 22 id. 458. Elliott *v.* Concord, 7 Fost. (N. H.) 204. 2 Dill. Mun. Corp. 929.

(*r*) Vinal *v.* Dorchester, 7 Gray, 421.

(*s*) Young *v.* Yarmouth, 9 Gray, 386.

(*t*) Id. 2 Dill. Mun Corp. 654. Com. *v.* Boston, 97 Mass. 555.

(*u*) Boucher *v.* New Haven, 40 Conn. 457. And see Galesburg *v.* Higley, 61 Ill. 287; City of Chicago *v.* Fowler, 60 id. 322; Market *v.* St. Louis, 56 Mo. 189; Cusick *v.* Norwich, 40 Conn. 375.

(*v*) Higert *v.* Greencastle, 43 Ind. 574. But see Bush *v.* Geneva, 3 Pars. (N. Y.) 409.

to the improper construction or unreasonable use of the sewers, or to the negligence or other fault of the city in the care or management of them(*w*).

The authorities of a municipal corporation, as a city, may establish such grade for its streets as may be thought fit, and no responsibility will be incurred for an error of judgment. But this exemption from liability does not exist, if, in sinking or repairing the street or sidewalk, it is left so as to be dangerous to the life or limbs of persons passing over it. Thus, a sudden slope of six inches in three and a half feet, made by the direction of the city authorities, in a sidewalk, leaving a grade of three-quarters of an inch to a foot, was held to be dangerous so as to render the city liable for injury to a person, caused by slipping upon the slope when covered with snow(*x*).

A city or town charged with a public duty in consideration of valuable privileges, is liable to an individual who suffers special injury from a neglect of the duty, and a city or town which derives an emolument from the exercise of powers conferred upon it, is liable for the negligent or unskilful exercise of these powers by its agents, or for the neglect of a duty which is imposed by or results from the exercise of them(*y*). In such cases the officers engaged in the execution of the powers are to be regarded as the agents of such city or town(*z*).

SECTION II.

REMEDIES FOR TORTS BY MUNICIPAL CORPORATIONS.

1539 *Remedies by action or indictment.*—The only remedies for the torts of municipal corporations, proposed to be noticed in this connection, are those provided by action and by indictment. There are, however, other efficient remedies, such as mandamus, quo warranto, certiorari, prohibition and remedy by writ of injunction, which must sometimes be resorted to as the only appropriate mode of obtaining relief in the particular case, incidental reference to which has been made in pre-

(*w*) Merrifield *v.* Worcester, 110 Mass. 216. See Mayor, etc., of Savannah *v.* Waldner, 49 Geo. 316; Smith *v.* Mayor, etc., of New York, 4 Hun (S. C.), 637.

(*x*) Clemence *v.* City of Auburn, 4 Hun (N. Y.), 886; *S. C.* 6 Pars. 665. And see Wallace *v.* The Mayor, etc., 2 Hilt. (N. Y.) 440; Clark *v.* City of Lockport, 49 Barb. 580; Barton *v.* Syracuse, 36 N. Y. (9 Tiff.) 54.

(*y*) Aldrich *v.* Tripp, 11 R. I. 1; *S. C.* 12 Alb. L. J. 349.

(*z*) Id.

ceding portions of this work. A full discussion of the subject must be sought for, in works professedly treating of legal and equitable remedies. The cases in which a private action will lie for the torts of a municipal corporation, have been noticed at some length in the preceding section, but it still remains to point out, very briefly, some of the distinguishing features of such an action.

1540 *Parties to actions for torts of.*—Proceedings in actions either by or against municipal corporations, and the officers representing them, are, for the most part, regulated by statute, and the statute of the particular state should be consulted on the subject. Where the name of the corporation is expressly defined by charter or statute, it is usually provided that by such name it may sue and be sued. In such case the true corporate name should be used both in suits by and against the corporation(*a*). But independent of statute, and for the purpose of effectuating rights which cannot otherwise be protected and enforced, the capacity of all public officers to sue and to be sued is recognized at *common law*, to an extent commensurate with their public duties and trusts; and the statutes expressly authorizing suits by and against particular officers, are, for the greater part, merely declaratory of this common law rule(*b*). A provision of law which makes a civil corporation liable "for the illegal doings and defaults" of its officers (there being no provision exempting the officers from liability) does not deprive an injured party of his right to pursue his remedy, personally, against the officer or agent who committed the injury. Both are liable in such a case(*c*).

As a general rule, process in an action against a corporation must be served on its head, or principal officer(*d*). Provisions are made, either in the statutes creating municipal corporations, or by general or special statutes, for the service of process upon the corporation, and generally in the case of a city, the mayor is the proper officer to be served(*e*). By statute, in New York, towns must be sued in their corporate name, the process must be served on the supervisor of the town, and it is made his duty to attend to the defence of the action(*f*). It

(*a*) 1 Dill. Mun. Corp. s. 123; and see Berks County, etc. *v.* Myers, 6 Serg. & R. (Pa.) 12; Romeo *v.* Chapman, 2 Mich. 179; Brittain *v.* Newland, 2 Dev. & Bat. (N. C.) 363.

(*b*) Avery *v.* Slack, 19 Wend. 55. Silver *v.* Cummings, 7 id. 181. Thayer *v.* Lewis, 4 Denio, 272. People *v.* Supervisors of New York, 32 N. Y. (5 Tiff.) 473. Minot *v.* Curtis, 7 Mass. 444. Porter *v.* Nekervis, 5 Rand. 359.

(*c*) Rounds *v.* Mansfield, 38 Maine, 586.

(*d*) See M'Queen *v.* Middletown Manufacturing Co., 16 Johns. 5.

(*e*) 1 Tidd's Pr. 116.

(*f*) See Hill *v.* Board of Supervisors of Livingston County, 12 N. Y. 52, 63; Town of Duanesburgh *v.* Jenkins, 46 Barb. 295.

is held in Kentucky, that in a suit against the trustees of a town, they must be severally named(*g*).

And in general, at common law, in actions either by or against public officers having quasi corporate powers, in their official capacity, the individual name of the incumbent must be used and the addition of the name of office(*gg*).

In respect to joinder of parties, it may be stated, generally, that where a municipal corporation and a private individual are joint tort feasors, and as such have caused injury to the person or property of another, the injured party may at his election maintain an action against the corporation or the individual separately, or join them in the action(*h*).

1541 *Pleadings in actions for torts of.*—No special rules need be given in respect to pleadings in actions against municipal corporations for wrongs. In matters of form the pleading must conform to the rules and practice of the state where the action is brought. The material facts to be alleged are, the existence of the corporation, the nature and character of its corporate powers and duties, the particular act of misfeasance or non-feasance which forms the subject of the action; and, in cases where notice to the corporation is necessary to fix its liability, the fact that such notice was given or had, or facts and circumstances from which it can be inferred, the resulting damage and demand for relief.

1542 *Evidence in actions for torts of.*—In the English courts, a distinction is taken between *rated* and *ratable* inhabitants, the former being held inadmissible as witnesses, and the latter being held competent(*hh*). This distinction has been recognized in some of the American courts, but it is not regarded as applicable to American institutions, and is not now observed(*i*). And by the enactment of statutes, *rated* inhabitants in England are now made competent witnesses in many cases(*j*). The rule at common law, recognized in many of the states of the Union, is stated to be that "in cases where corporations of a public nature, comprehending the divisions of the state, or institutions for charitable or pious purposes, such as counties, towns, school districts, religious or charitable societies, are parties to the record, or interested,

(*g*) Lexington *v.* M'Connell, 3 A. K. Marsh. 224.
(*gg*) Supervisor of Galway *v.* Stimson, 4 Hill, 136.
(*h*) Saverin *v.* Eddy, 52 Ill. 189.
(*hh*) Regina *v* Adderbury, 5 Ad. & El. (N. S.) 187.
(*i*) See Bloodgood *v.* Jamaica, 18 Johns. 285; Com. *v.* Baird, 4 Serg. & R. (Pa.) 141.
(*j*) See 8 Geo. 4, c. 29, 30; 3 & 4 Vict. c. 25.

the members of the corporation, having no individual interest, are competent witnesses(*k*). The interest of inhabitants, merely as such, has been deemed too remote and contingent, as well as too minute, to disqualify them as witnesses(*l*). In many of the states, the inhabitants of counties and other municipal, territorial, or *quasi* corporations, are, however, expressly declared by statutes to be competent witnesses in all suits in which the corporation is a party. In New York, and many other states, the common-law rule excluding witnesses on the ground of interest, has been abrogated by statute.

An admission by a corporation of a fact or of a liability, duly and properly made, is evidence against it. But it seems to be the settled doctrine in the United States, that the admission of a *corporator* cannot be received in evidence against the body(*m*). Though the admission of an *officer*, when made in the ordinary course of his official duty, and within the scope of his powers, may be admissible against the corporation(*n*). In order to render a municipal corporation liable for injuries sustained from its neglect to repair the streets or sidewalks, it is essential that the plaintiff be free from any such fault or neglect on his part as will, in actions for negligence, defeat a recovery. It is held, however, that where the question is not controlled by statute, "contributory negligence" on the part of the plaintiff is a defence to be proved by the defendant(*o*). The fact that the plaintiff, with full knowledge of the defect, voluntarily attempted to pass it, is not conclusive evidence of the want of due care on his part, but is to be left for the jury to determine(*p*).

1543 *Damages recoverable in actions against.*—On the subject of damages generally in such actions, see the cases cited below(*q*). It has been ruled in a case under the Massachusetts statute, that damages are recoverable against a town only for an injury to the person or property,

(*k*) M. E. Church of Cincinnati *v.* Wood, 5 Ham. (Ohio) 583, 584.

(*l*) Fuller *v.* Hampton, 5 Conn. 416. Corwain *v.* Hames, 11 Johns. 76. Eustis *v.* Parker, 1 N. H. 273. *Ex parte* Kip, 1 Paige, 613.

(*m*) 1 Dill. Mun. Corp. s. 342. Osgood *v.* Manhattan Co., 3 Cow. 612, 623. Hartford Bank *v.* Hart, 3 Day (Conn.), 493.

(*n*) Peyton *v.* Hospital, 3 C. & P. 363. See Glidden *v.* Unity, 33 N. H. 571; Mitchell *v.* Rockland, 41 Maine, 363; Toll Co. *v.* Betsworth, 30 Conn. 380; County *v.* Simmons, 5 Gilm. (Ill.) 516.

(*o*) Railroad Co. *v.* Gladmon, 15 Wall. (U. S.) 401. Beatty *v.* Gilmore, 16 Pa. St. 463. But see Moore *v.* Abbott, 32 Me. 46; Rusch *v.* Davenport, 6 Iowa, 443; Murdock *v.* Warwick, 4 Gray, 178.

(*p*) Lyman *v.* Amherst, 107 Mass. 339. See Aurora *v.* Pulfer, 56 Ill. 270; Humphreys *v.* County, 56 Pa. St. 204; Pollard *v.* Woburn, 104 Mass. 84; Wheeler *v.* Westport, 30 Wis. 392; Street *v.* Holyoke, 105 Mass. 82; *S. C.* 7 Am. R. 500.

(*q*) Shartle *v.* Minneapolis, 17 Minn. 308. Collins *v.* Council Bluffs, 32 Iowa, 324. Chicago *v.* Langlass, 52 Ill. 256. McGory *v.* Lafayette, 12 Rob. (La.) 668. Canal Co. *v.* Graham, 63 Pa. St. 290. Decatur *v.* Fisher, 53 Ill. 407.

and not merely on account of a risk or peril, which causes fright and mental suffering. But where an actual injury to the person is sustained, however small, which causes or is necessarily attended with mental suffering, that suffering is a part of the injury for which the town is liable in damages(*r*).

In Wisconsin, under a statute similar to the Massachusetts statute, it was decided in an action for injuries to the plaintiff's person, caused by a defective highway, that the plaintiff might recover the value of his time and services about his business, necessarily lost by reason of such injuries; and that he might, therefore, show the nature and value of his business, and the extent to which it was necessarily interrupted by his injuries(*s*). In Kansas, it is held, that the measure of recovery is for the loss of time, for expenses, and for physical pain which had resulted from the injury up to the time of the commencement of the action, and if the plaintiff is still disabled from such injury, such further damages as appears from the evidence to be the natural and probable result of such injuries(*t*). But it is only compensatory, not punitive damages that may be recovered(*tt*).

Corporators are not personally liable for the debts of the corporation at common law(*u*); but by usage and practice, *quasi* corporations in the states of New England form an exception to this rule, and private property may there be taken to satisfy a corporate judgment(*v*).

1544 *Remedy by indictment.*—Municipal corporations, both in England and the United States, are held liable to indictment for misfeasance, as well as non-feasance, in respect to such duties as they owe to the public(*w*). Thus, in Kentucky a municipal corporation is indictable, as at common law, for suffering its streets to become and remain out of repair(*x*). So, a town in Vermont is liable to an indictment, as at common law, for not erecting a bridge pursuant to an order from a competent tribunal(*y*). In Pennsylvania an indictment lies at common law against public officers for neglect of public duties, and this prin-

(*r*) Canning *v.* Williamstown, 1 Cush. 451. And see Harwood *v.* Lowell, 4 id. 310; Reed *v.* Belfast, 20 Me. 246; Chidsey *v.* Canton, 17 Conn. 475.

(*s*) City of Ripon *v.* Bittel, 30 Wis. 614.

(*t*) City of Atchison *v.* King, 9 Kansas, 550. Wiesenberg *v.* Appleton, 26 Wis. 56.

(*tt*) Chicago *v.* Langlass, 52 Ill. 256.

(*u*) Horner *v.* Coffey, 3 Cush. 434.

(*v*) Beardsley *v.* Smith, 16 Conn. 368. Gaskill *v.* Dudley, 6 Met. 551. See North Lebanon *v.* Arnold, 47 Pa. St. 488.

(*w*) State *v.* Hudson County, 1 Vroom (N. J.), 137.

(*x*) Com. *v.* Hopkinsville, 7 B. Mon. 38. And see Chattanooga *v.* State, 5 Sneed (Tenn.), 578; State *v.* Mayor, 11 Humph. 217.

(*y*) State *v.* Whittingham, 7 Vt. 390. As to towns in Maine, see Davis *v.* Bangor, 43 Me. 522; State *v.* Gorham, 37 id. 451.

ciple has been extended to a contractor for the repair of roads(z). And in North Carolina, it is declared, that "a public officer intrusted with definite powers to be exercised for the benefit of the community, who wickedly abuses or fraudulently exceeds them, is punishable by indictment"(a). And for the maintenance of a public nuisance upon its property, a municipal corporation may be indicted the same as an individual, and subjected to punishment(b). But it has been held that a town in Vermont is not indictable for not removing a nuisance not created by it or its agents(c). And the liability of a municipal corporation to indictment for keeping and maintaining a "calaboose," so situated or managed as to become a nuisance, has been questioned(d).

The remedy by indictment is, however, more properly a matter for discussion in works treating of criminal law, and has been introduced here rather by way of suggestion, than with any intention of treating the subject at large.

(z) Phillips v. Com., 44 Pa. St. 197.

(a) State v. Glasgow, N. C. Can. R. 186. State v. Justices, etc., 4 Hawks, 194. And see Paris v. People, 27 Ill. 74; State v. Burlington, 36 Vt. 521.

(b) Administrator v. Insurance Co., 1 Dis. (Ohio) 336. Harper v. Milwaukee, 30 Wis. 365.

(c) State v. Burlington, 36 Vt. 521.

(d) Paris v. People, 27 Ill. 74.

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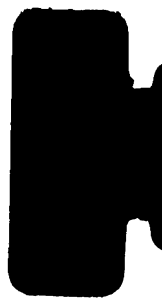
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